Supreme Court, U. S.
FILED
FEB 3 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1230

HUBERT MORELOCK, EUGENE BORGERDING, WILLIAM EVANS, CLAYTON METCALF, AND RALPH SAUNDERS

Petitioners,

vs.

THE NCR CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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February 5, 1979

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, Hubert Morelock, Eugene F. Borgerding, William O. Evans, Clayton Metcalf and Ralph B. Saunders respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this case on October 6, 1978.

REPORTS OF THE OPINIONS IN THE COURTS BELOW

The earlier opinion of this Supreme Court granting Writ of Certiorari and remanding this case to the Sixth Circuit (Mar. 6, 1978) was reported at 435 U.S. 911 and appears in the Appendix, at page 22a.

The most recent decisions of the Sixth Circuit Court of Appeals (Oct. 6, 1978) affirming Judgment n.o.v. (App. 2a to 21a), and denying the petition for rehearing (Nov. 9,

1978) (App. 1a) have not been reported but appear in the Appendix as herein noted.

The decisions of the District Court for the Southern District of Ohio have not been reported, but appear in the Appendix, infra. App. 23a to 25a.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on October 6, 1978 affirming the District Court's grant of Judgment Notwithstanding the Verdict entered April 16, 1975. A timely petition for rehearing en banc was denied on November 9, 1978, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the *McDonnell Douglas* test of a prima facie case should be applied in ruling upon motion for judgment notwithstanding the verdict of a jury in a private civil action under the Age Discrimination in Employment Act.

2. Whether statistical evidence may serve as a means of establishing a prima facie case of age discrimination in employment.

3. Whether a simplistic "substantial evidence" formulation of the test to be applied in ruling upon motion for judgment n.o.v., suffers abridgement of the right to jury trial pursuant to the now-determined Congressional intention that jury trial be afforded in private age discrimination suits[1] and as guaranteed by the Seventh Amendment to the Constitution.

4. Whether upon the presentation of a prima facie case of employment discrimination there occurs a shifting of the

[1] See *Lorillard* v. *Pons* 434 U.S. at 575 1978.

burden of production of the evidence or whether there occurs instead a shifting to the employer of the burden of persuasion either generally or as to any affirmative defenses.

5. Whether a searching of the record for conflicting circumstantial evidence, or a preoccupation with the movant's evidence upon reviewing a judgment n.o.v., suffers abridgement of right of jury trial under the A.D.E.A. and as guaranteed by the Seventh Amendment to the Constitution.

6. Whether the decision below affirming judgment n.o.v. was clearly erroneous.

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the Constitution of the United States provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States than according to the rules of the common law."

The Age Discrimination In Employment Act, United States Code, Title 29: Sec. 621 (b)

> "It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; . . ."

Sec. 623 Prohibition of age discrimination – Employer practices

"(a) It shall be unlawful for an employer–

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because of such individual's age; and

(2) to limit, segregate; or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee, because of such individual's age; . . ."

"(f) It shall not be unlawful for an employer . . .

(2) to observe the terms of a bona fide seniority system, . . . which is not a subterfuge to evade the purposes of this chapter . . . ."

STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of first instance, the U. S. District Court for the Southern District of Ohio, was the existence of questions which arose under a law relating to interstate commerce, the Age Discrimination in Employment Act 29 U.S.C., Sec. 621 et seq. and pursuant to 28 U.S.C. Sec. 1331.

These actions were brought under the A.D.E.A. by five employees to recover as individually applicable, lost wages, damages for mental anguish and personal injuries sustained, punitive damages, liquidated damages, injunctive relief, reinstatement, attorney fees, and costs.

The first stage of the bi-furcated trial concluded when individual verdicts were returned by the jury on the fifth day of trial, finding the sole submitted issue of age discrimination liability in favor of the petitioners and against the respondent.

The Trial Court thereafter overturned the jury's five verdicts of liability and granted the respondent both judgment notwithstanding the verdicts and a conditional order of new trial in the event the judgment n.o.v. were not sustained on appeal (App. 24a-25a). The Trial Court declined to explain the basis of the grant of judgment n.o.v.

The Court of Appeals first affirmed the judgment n.o.v. by declaring the jury verdicts of no consequence as being the work on an "advisory jury" only, decreeing the issues which were tried in the case to have been "equitable in nature, directly analagous to the equitable issues pursued in actions under 29 U.S.C. Sec. 217 and 42 U.S.C. Sec. 2000e-5, and not suitable for trial by jury." *Morelock* v. *NCR*, 546 F.2d 682.

Remand was however, ordered to the District Court for findings of fact and conclusions of law.[2]

The U. S. Supreme Court granted Writ of Certiorari, vacated the Sixth Circuit's judgment and remanded the case for further consideration in light of *Lorillard* v. *Pons*, 434 U.S. 575, which had found a right to a trial by jury in a private civil action under the A.D.E.A.

Upon remand, the Sixth Circuit affirmed the grant of judgment n.o.v. and thereafter denied petition for rehearing en banc.

By 1971 each of the five petitioners were long term employees of the respondent, each having worked for NCR at its Dayton, Ohio facilities well in excess of 20 years, each being at that time over 40 years of age, yet under age 65.

Although each of the petitioners began their NCR employment doing work other than in the field of electronics, they each availed themselves of extended coursework and night classroom study and eventually thereby were able to secure entry to work as electronic product development technicians. Their transition from mechanical skills to skills in the field of electronics was in keeping with the same grad-

[2] Upon subsequent remand from the Supreme Court, the Sixth Circuit ruled that findings of fact and conclusions of law were no longer required of the District Court in light of the jury's change in status from an advisory body to a jury of right. (App. 5a)

ual transition within respondent's product lines to electronic cash registers, computers and other electronic business machines as was also witnessed throughout that industry beginning in the early 1950's.

The petitioners were classified by the respondent immediately prior to the complained-of discrimination as "Senior Development Electronic Technicians" assisting in the development of new electronic products by creating working models, or prototypes from the paperwork designs and calculations of the respondent's electronic theorists and designers.

Over the years, the respondent had developed groupings of vocations, wherein an employee was promoted and expected to progress from the lower to the higher vocations within the same "family of vocations" as he gained experience and greater skill. As applied to these petitioners, and once the vocation nomenclature had been established, an inexperienced worker could be expected to progress from the "lab aid" vocation to the "junior electronic development technician" vocation and ultimately to the "senior electronic development technician" vocation.

The petitioners were part of the "office and technical" group which ceased to have any recognized bargaining agent following a decertification of the former independent union in 1971.

Employment levels at the respondent's Dayton facilities fell drastically during the early 1970's from a peak of approximately 21,000 to around 8000 at the time of trial, March 1975. Those reductions in the workforce were occasioned in part as result of the implementation of a plan of decentralization adopted in the mid 1960's and in part as result of the near total abandonment of the respondent's line of mechanical cash registers, this in keeping with the industry trend toward electronic machines.

The single classification of electronic development technicians which had existed prior to 1965 was then bisected

into two classifications: the senior development electronic technicians – having the higher skill level by job description – and the junior development electronic technicians. See Ex. 20 and 21, pages 26a-30a of Appendix hereto.

As of 1971, a noticeable segregation of the older development electronic technicians apart from the younger technicians was statistically evident when 25 of the then 43 seniors were age 40 or above, while only 3 of the then 29 juniors had yet reached age 40. The "seniors" were on average, a full 10 years older than their "junior" counterparts. (R. 234, 339-41, 495.)

The 1965 bisecting of the development electronic technicians into two classes remained largely insignificant in terms of the employment opportunities extended to the older technicians by virtue of company rules in the seniority scheme whereunder a senior technician displaced by a work force reduction could displace in turn a junior technician with less years with the company.

In 1968, however, that latter provision was eliminated thereby serving to completely isolate the older group from the employment opportunities extended to the younger group of technicians.

Following a device called "time-increment bumping," highly skilled senior technicians when displaced from such work as result of a work force reduction, were given assignments such as a xerox machine operator, in the case of petitioner Eugene Borgerding (R. 66), or that of a manual clerk, in the case of petitioner Hubert Morelock (R. 64), or as a mail sorter in the case of petitioner Ralph Saunders (R 68), which assignments were fully alien to their "family of vocations" and which work to them was understandably very demeaning and humiliating as well as financially unrewarding.

The illogical flow characteristic of time-increment bumping worked at odds with the employee's natural inclinations to gain advancement and promotion. A talented junior

technician when offered promotion to the senior ranks would decline in order to avoid his name being taken from a secure position near the top of the junior technician's listing to a most vulnerable place at the very bottom of the senior's seniority list. (R. 213, 294-95, 559-60)

As with most seniority systems, the skill of the employees, each as compared with the other, was totally aside and irrelevant to how the system operated to determine which employee stayed and which left. No evaluation of relative skill levels was at all involved.

By the end of the 1971-74 period, 38 of the original 43 senior technicians were no longer so employed while only 9 of the original 29 juniors encountered a similar fate. (R. 234, 268, 339, 340, 341 495)

	Senior Techs	Junior Techs
1971	43	29
1974	5	20

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Decisions of Other Courts of Appeals in Actions under the A.D.E.A. and in Turn Fails to Follow A Decision of This Supreme Court Establishing the Test to be Employed in Passing Upon the Issue of A Prima Facie Case of Employment Discrimination

This Sixth Circuit decision both failed to follow the Supreme Court's decision in *McDonnell Douglas Corp.* v. *Green*, 41 U.S. 792 (1973), and as well failed to offer any explanation for its avoidance.

That 1973 decision standardized the ingredients of a prima facie case in the Title VII, failure-to-hire setting. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

There being no discernible distinction to be drawn between race discrimination and age discrimination in employment, such as would otherwise render analogous *McDonnell Douglas* guidelines here inapplicable, a conflict between that Supreme Court decision and this Sixth Circuit case, thereby necessarily arises.

The evidence in this age discrimination case included proof that:

1. the petitioners were each over age 40, yet under age 65;
2. the petitioners were more than qualified to perform the work assigned to the less-skilled "junior technicians" who continued to retain work assignments as electronic technicians;
3. despite their excellent qualifications, three of the petitioners were demoted to humiliating and menial task assignments and the remaining two were on the very brink of encountering the same fate; and
4. following and throughout the demotions of the three petitioners, electronic technician assignments continued to be extended to numerous and less skilled "junior technicians," nearly all of which were under age 40.

The October 6th decision's non-mention of *McDonnell Douglas* implicitly admits that its terms and provisions were not applied.

This case of non-mention of the *McDonnell* guidelines follows an earlier decision of the same Sixth Circuit Court wherein doubt of their applicability was expressed: "While it may not be unreasonable to assume that in a proper case the guidelines established in *McDonnell Douglas* v. *Green* can be applied in age discrimination jury cases, we believe it would be inappropriate simply to borrow and apply them automatically." *Laugeson* v. *Anaconda*, 510 F. 2d 312 (Sixth Cir. 1975)

CONFLICT WITH THE CIRCUITS

A 1974 Fifth Circuit decision, *Wilson* v. *Sealtest Foods Division of Kraftco Corporation*, 501 F. 2d 84, 86, was followed by further holdings in that circuit confirming that the analogous *McDonnell* guidelines were to be applied to suits under the A.D.E.A. ". . . the four elements . . . (1. the employee's membership in the protected group; 2. his discharge; 3. his replacement with a person outside the protected group; 4. his ability to do the job.) . . . parallel the elements of the prima facie Title VII case discussed in *McDonnell Douglas*. . . . We have held that these elements constitute a prima facie A.D.E.A. case as well." *Marshall* v. *Goodyear Tire and Rubber Co.*, 554 F. 2d 730 (Fifth Cir. 1977), citing *Sealtest supra*, and *Lindsey* v. *Southwestern Bell Telephone Company*, 546 F. 2d 1112, 1124 (Fifth Cir. 1977).

A 1977 Eighth Circuit decision also found *McDonnell* applicable to A.D.E.A. suits: 'While the proof required for a prima facie case of discrimination will vary depending upon the specific factual situation, see *McDonnell* . . ., we find . . . no evidence that she was replaced by a younger person." *Moses* v. *Falstaff Brewing Corp.*, 550 F. 2d 1113 (Eighth Cir. 1977)

The First Circuit Court of Appeals both acknowledged and applied the *McDonnell Douglas* test in its review of a directed verdict in an age discrimination case:

> ". . . since this is a discrimination case, the shadow of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 5 FEP Cases 965 (1973) cannot be avoided. We therefore assume for purposes of this opinion, without so deciding, that the *McDonnell Douglas* test applies to age discrimination cases. It is clear that appellants have failed to make out a prima facie case under the *McDonnell Douglas* test because there is no evidence that they were qualified for work in the cargo department; the only evidence is that they were not qualified." *Landron Trinidad* v. *Pan Am. World Airways* (First Cir. A., May 1978), 17 FEP Cases 553, 555.

The plaintiffs in *Landron* had failed to meet a typing requirement of the job in the cargo department while in this case the plaintiffs had more than met the requirements of the "junior technician" classification. Their very classification as "senior techs" served as an admission of that fact pursuant to the company-devised job descriptions, Exhibits 20 and 21 at trial, see pages 26a-30a of the Appendix hereto. Those job descriptions required of the "senior techs" every skill of the "junior techs" plus a talent for creativity not required of the "junior techs."

The only evidence that even alluded to the notion that petitioners were not qualified to do the work of the junior techs under *McDonnell Douglas* was instead an admission of age-bias made by none less than the respondent's Director of Industrial Relations, who (in a fashion directly analogous to sex discrimination-weightlifting precedents) explained that the "seniors" had been segregated apart from the juniors for reason that the juniors:

> "would reflect a new expertise, a new skill, related but new, and a new technology *which the senior could not be expected to have.*" (R. 598)

See: *Bowe* v. *Colgate Palmolive Co.*, 416 F. 2d 711 (Seventh Cir. 1969)

The job descriptions (Exhibits 20 and 21, see pages 26a-30a of the Appendix hereto) of course made no concessions to age and instead required of the senior technicians a greater level of skill over that required of the "juniors." The intent underlaying the passage of the A.D.E.A. was "to ensure that hiring (and presumably employee retention) decisions are based on objective evaluations of individuals' potential for job performance, rather than on misconceptions about the effects of age on ability." 90 Harvard L.R. 380-81, citing 29 U.S.C. Sec. 621(b)(1970) and others.

Further, no evidence was presented nor did Respondent's counsel ever argue to the Court or jury that the thus-mouthed admission of age-prejudice by the Director of Industrial Re-

lations was somehow factually justified, such that the "seniors" were "not up with the times" or not as a group capable of executing the tasks assigned to the "junior technicians."

The Sixth Circuit's failure to apply the *McDonnell Douglas* test was no harmless omission as the record amply demonstrates that were the test instead to have been applied, a prima facie case indeed, would have been clearly found.

2. The Decision Below Conflicts with the Decisions of the Other Courts of Appeals In Age Discrimination In Employment Suits Which Decisions Approved The Use of Statistical Data To Establish A Prima Facie Case

The decision below is in direct conflict with the decisions of two other Circuit Courts of Appeal holding that a prima facie case of age discrimination in employment might well be made out by statistical evidence. See *Hodgson* v. *First Federal Savings and Loan Association,* 455 F. 2d 818, 823 (Fifth Cir. 1972), and *Marquez* v. *Omaha Dist. Sales Office,* 440 F. 2d 1157, 1160-61 (Eighth Cir. 1971).

Likewise, the decision below is in conflict with the decisions of other Circuits consistently holding in Title VII litigation that discrimination in employment procedures may be established by statistical data. See *United States* v. *N.L. Indus., Inc.* 479 F. 2d 354 (Eighth Cir. 1973); *United States* v. *Wood, Wire and Metal Lathers Int'l Union,* 471 F. 2d 408 (Second Cir. 1973); *Parham* v. *Southwestern Bell Tel. Co.,* 433 F. 2d 421 (Eighth Cir. 1970).

The October 6th, 1978 decision dismisses the statistical evidence presented at trial in the following fashion: "We do not believe that the number of senior techs laid off is so excessive in comparison with the number of junior techs laid off as to conclude that NCR, is laying off its electronic technicians,

was discriminating on the basis of age." *Morelock* v. *NCR Corp.* (App. 21a herein).

This language at first blush leads us to believe that the reviewing court acknowledged the role of statistical evidence but simply found plaintiffs' statistics, insignificant or not revealing any "marked disparity."

That inference however must surely fail in light of the overwhelming import of the statistics themselves such that four seniors were deprived of employment as electronic development technicians for every one of the juniors. (R. 234, 268, 339, 340, 341, 495) The significance of those statistics was underscored by the evidence that all the while (1970-1974) the respondent was discarding the more skilled technicians at a ratio of 4 to 1 over the less skilled (Exhibit 20 and 21, App. 26a-30a to this Petition), this same employer was in process of converting its product lines from mechanical to electronic business machines and thus the need for the greatest skill among its electronic development technicians was at its peak.

The only remaining reasonable conclusions with which we are left, therefore are either, that the Sixth Circuit has jettisoned statistical evidence "in toto" as a means of establishing a prima facie case, — thereby creating a conflict among the Circuit Courts — or has applied an inappropriate judicial role in weighing such statistical evidence when determining "significance" or "marked disparity." (See Reasons for Granting the Writ No. 3, p. 14 of this Petition).

3. The Decision Below Conflicts with the Decisions of Other Courts of Appeals And With The Decisions of The Supreme Court as to the Proper and Constitutional Standard To Be Applied In Ruling Upon Motion For Judgment N.O.V.

After extending briefing prior to the decision granting judgment n.o.v., the Trial Court overtly opted for an evidence-weighing and simplistic "substantial evidence" formulation of the standard to be judicially applied. See p. 24a of Appendix hereto.

Upon its October 6th, 1978 (and second) review, quoting "a leading authority on federal civil procedure . . ." the Sixth Circuit observed in effect that it makes no differences as to what formulation of the test is employed: "'Although . . . courts have used other phrases than the one preferred here (namely, the reasonable minds test) to describe the standard of sufficiency of evidence, it is unlikely that there is any real difference in result' . . . and in view of the fact that there is no evidence on the record which indicates that the trial judge weighed the evidence, we find no prejudicial error." See p. 15a of Appendix hereto.

Of course, there was no evidence on the record which indicated at all what the trial judge did, that being the basis for the first Sixth Circuit panel's decision (December 20, 1976) to remand the case for the Trial Courts findings of fact and conclusions of law. 546 F.2d 682.

Although observing in a footnote to the October 6th, 1978 decision ". . . it is the better practice in cases such as the instant case, in which the facts are complex, for a trial court to delineate with specificity its reasons for the grant of judgment n.o.v. rather than merely stating conclusively, as did the District Court here, that there was no substantial evidence to support the jury's verdict. . . ." (App. p. 5a), the appellate court was content to rest upon the totally ambiguous silence of the record to surmise that the Trial Court had done nothing wrong, and further relied upon Rule 52 to overturn the remand

order previously issued to the Trial Court, in the December 20th, 1976 decision.

We submit that the verbal formulation employed can well make a difference to the result, hence Judge Rives' observation: ". . . I note that, notwithstanding all the variations which the Supreme Court has played on its sufficiency theme, I have been unable to find a single instance in which the Supreme Court has used 'substantial' in any of its aritculations of the constitutional standard." *Boeing Co.* v. *Shipman*, 411 F. 2d 365, 393-94 (Fifth Cir. 1969).

The observation by the treatise write that the word "substantial" when infused within the reasonable minds test, doubtfully "adds anything of value," misses the crucial point that its infusion suffers the grave risk of an unconstitutional quantitative weighing of the evidence by the judge. Moreover in this case, it was no infusion within the reasonable minds test but rather a naked and simplistic "substantial evidence" test that was employed by the Trial Court. See p. 24a of Appendix hereto.

The use of that simplistic test having now been confirmed by this decision of the Sixth Circuit Court of Appeals, surely stands in conflict with the decisions of other circuits and those of this Supreme Court. *Sentilles* v. *Inter-Caribbena Shipping Corp.*, 361 U.S. 107, 4 L. Ed. 2d 142, 80 S. Ct. 173; *Giodano* v. *Lee*, 434 F. 2d 1227, 1231 (Eighth Cir. 1970); *Taylor* v. *National Trailer Convoy Inc.*, 433 F. 2d 569, 571-72.

4. The Decision Below, While Consistent With An Earlier Decision In The Same Circuit, Conflicts With The Decisions of Other Courts of Appeals as to Whether The Burden of Persuasion Shifts to the Employer Upon A Showing Of A Prima Facie Case Of Employment Discrimination

Although assigned as error and briefed to the Court below, no mention was made of the petitioners' 10th Argument on appeal which bore upon the burden of persuasion subsequent to the presentation of a prima facie case.

The tone of the Circuit Court's discussion of the bona fide seniority system defense without reference to its "affirmative" character and the otherwise omission of any direct reference to this issue in the October 6, 1978 decision sustaining judgment n.o.v. (App. 2a-21a) prompts our inference that the Sixth Circuit thereby has continued to hold to its rule announced in *Long* v. *Ford Motor Co.*, 496 F. 2d 500, 505-506 (Sixth Cir. 1974). That case held that only the burden of production or the burden of "articulation" of an affirmative defense befalls an employer in the wake of a prima facie case.

However, ". . . In general the federal courts of appeals which have considered this issue have interpreted (*McDonnell Douglas v.*) *Green* . . . as shifting the entire burden of persuasion to the defendant once the prima facie showing is made." 90 Harvard Law Review 380, 389 citing *Rodriguez* v. *East Texas Motor Frt.*, 505 F. 2d 40, 58 (Fifth Cir. 1974); *Vulcan Society of the New York City Fire Dept.* v. *Civil Service Commission*, 490 F. 2d 387, 393 (Second Cir. 1973); *Holthous* v. *Compton and Sons*, 514 F. 2d 651 (Eighth Cir. 1975); *Gates* v. *Georgia Pac.* 492 F. 2d 292, 295-96 (Ninth Cir. 1974).

See also the discussion in 90 Harvard L.R. 380, 392 wherein the ". . . justifications put forth by the *Laugeson* court for imposing a different burden of proof in A.D.E.A. cases than in Title VII actions . . . were found to be not persuasive."

5. The Decision Below Conflicts With The Decisions Of The Supreme Court As To The General Standard To Be Employed When Passing Upon The Sufficiency Of Evidence To Create A Jury Issue In Civil Litigation Arising Under Federal Law

In reaching its conclusion affirming judgment n.o.v., the Sixth Circuit Court of Appeals plainly and openly "searched the record for conflicting circumstantial evidence . . . on a theory that the proof gives equal support to inconsistent and uncertain inferences. . . .", this in plain conflict with the Supreme Court's decision in *Tennant* v. *Peoria and P.U. Ry. Co.*, 64 S. Ct. 409, 412, 321 U.S. 29, 35, 88 L. Ed. 520 (1944).

See also *Lavender* v. *Kurn*, 66 S. Ct. 740, 327 U.S. 645, 90 L. Ed. 916 (1946), holding that ". . . only where there is a complete absence of probative facts to support the conclusion reached does a reversible error appear."

Likewise the October 6th, 1978 decision abandons the rule announced in *Wilkerson*: ". . . we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given." *Wilkerson* v. *McCarthy*, 69 S. Ct. 413, 415, 336 U.S. 53, 57, 93 L. Ed. 497 (1949).

The October 6th decision simply bores upon those statistics and pieces of evidence which tended to support the respondent, either ignoring entirely the petitioners' evidence, or placing a strained interpretation thereon or deriving an inference contrary to discrimination. See pp. 17a-19a to Appendix hereto.

This case arises under the A.D.E.A., and therefore should be ruled by the same standards applicable to F.E.L.A. and Jones Act cases. If not, then the observation that ". . . A decision by the Supreme Court, clearly stating which view it takes as to the scope of the F.E.L.A. and Jones Act decisions, would be of helpful guidance to the lower courts. . . ." is, here applicable. See *Boeing Co.* v. *Shipman*, 411 F. 2d 365, 373 n. 10, (Fifth Cir. 1969).

Thus the decision below chronicles ". . . there were persons in each vocation who were under the age of forty, as well as those who were forty years of age and older" (App. p. 19a). Notably missing were the statistics adduced by petitioners showing that as of 1971 the ranks of the senior techs (25 of 43) were filled with technicians age 40 or above at a ratio nearly 6 times that which applied in the ranks of the junior techs (3 of 29). R. 234, 268, 339, 340, 341, 495.

Thus, the decision below chronicles "that the motive for the creation of two electronic technicians vocations was economic, that is, to permit NCR to hire inexperienced technicians at a lower salary than that paid to experienced electronic technicians. . . ." (App. p. 17a) Notably missing is any mention of the statement of the Director of Industrial Relations who had explained the segregation of the seniors apart from the juniors because the seniors ". . . could not be expected to have . . . the new expertise, new skills, and the new technology of the junior techs." R. 598

6. The Decisions Below Entering And Then Affirming Judgment N.O.V. Were Clearly Erroneous As A Matter Of Law

A stipulation entered by the parties at trial was given a near controlling thrust and construction by the decision below:

> "'. . . the following employees with the noted seniority and birthdates having been reduced from such vocation during this period due to lack of work within such vocation. (emphasis added)' A party is bound by what he stipulates. The above stipulation gives the reason why plaintiffs were laid off, namely, there was no work for senior techs. This stipulation in our opinion, should preclude the plaintiffs from claiming that they were laid off for any other reason." See p. 21a of Appendix hereto.

This above construction placed upon the stipulation is founded upon a most essential misperception of the petitioners' grievance presented at trial, and is further totally novel to this case, first appearing in print to our knowledge only in the October 6th, 1978 decision. It surely was not the meaning intended by the petitioners nor the meaning understood or taken by the Trial Court nor even a meaning which occurred to the respondent throughout the entire proceedings before the Trial Court.

Instead, we submit that this stipulation was simply the result of an acknowledgment by these petitioners that product development and work assignment decisions were matters reserved within the exclusive province of management under the terms of the expired but, then-applied 1968 contract. Thus it made little sense for these petitioners to substantially lengthen the trial in order to debate that the remaining electronic development tasks required the higher level of skills possessed by the senior technicians, or to debate the respondent's decision that a once-planned future product line should not have been abandoned, or should not have been shifted and reassigned for development to another of the respondent's plants. Neither were petitioners inclined to debate that there had in fact occurred a generalized reduction in the level of employment at the respondent's Dayton facilities.

Of most significance here, however, these petitioners based their claim in this case not upon the employer's act of demoting them *from* the Senior Development Technician vocation – the sole matter addressed in the stipulation – but instead, to the respondent's act of assigning the plaintiffs *to* humiliating, menial and totally unrelated work assignments; to the respondent's act of *segregating the seniors apart* from the juniors; and to the respondent's omission in *not considering them* for the electronic development technician's work, albeit at that lower rate of pay, which work the employer continued to extend to the "junior techs."[3]

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[3] Petitioner's statement of the "general nature of their claims" as embodied in the Final Pretrial Order made no mention of the demotions

Not at trial, nor during the proceedings on directed verdict and judgment n.o.v., nor to our reading within the memoranda and briefs submitted to the Circuit Court prior to the Supreme Court's remand was such construction ever asserted by the respondent.

The doctrine of the Law of the Case should preclude this unwarranted torpoedoeing of the petitioners' action at this late moment in the proceedings. See 5 Am Jur. 2d, Appeal and Error Section X. Review, D. Law of the Case.

Further, the respondent is precluded from asserting this "stipulation" argument for the first time at the second oral argument and after remand from the Supreme Court since "a motion for judgment notwithstanding the verdict, like a motion for directed verdict, must state the grounds on which it was made. Since it is technically only a renewal of the motion for directed verdict made at the close of the evidence, it cannot assert a ground that was not included in the motion for directed verdict." 9 Wright and Miller, Federal Practice and Procedure sec. 2537, p. 598, citing *Arkwright Mut. Ins. Co.* v. *Philadelphia Elec. Co.*, 427 F. 2d 1273, 1274-75; *Lewis* v. *Mears*, 189 F. Supp. 503, affirmed 297 F. 2d 101 (Third Cir. 1961); and *Rothenberg* v. *H. Rothstein and Sons*, 9 F.R.D. 211, affirmed 183 F. 2d 524 (Third Cir. 1950).

The Trial Court meanwhile had apparently granted judgment n.o.v. upon an entirely different and equally unfounded premise, being that of "reverse discrimination."

The colloquy between the Court and petitioners' counsel at the time of respondent's motion for directed verdict (R-722-25) revealed the Court's concern over how a seniority system could ever be the instrument of discrimination against age and its corollary element "years of service" when it is the younger and least senior person on the list who must leave the employ first.

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from the Senior Technician vocation and instead alleged "that the Defendant has limited, segregated or classified its employees in a way which deprives or tends to deprive Plaintiffs of employment opportunities . . ." R. 62

Likewise the only hint of any basis for the grant of judgment n.o.v. appearing in the Trial Court's written order was stated as follows:

> ". . . three of the plaintiffs . . . were reduced in grade *in reverse order* of seniority during a reduction in force at defendant's plant." (emp. add.) See p. 25a of Appendix to this petition

Although submitted and argued to the Sixth Circuit, no mention of that most-apparent basis for the Trial Court's action, was ever made by the Sixth Circuit's October 6, 1978 decision.

The fallacy in such reverse discrimination theory lies in an essential element of discrimination law, namely that the differences between members of two classes, treated differently in terms of employment opportunities extended them as result of their classifications, must be substantial and relevant to that use to which the classification system is applied.

Here, the only difference – aside from age and years service – between the seniors and junior techs, to wit, a higher level of skill possessed by the former, was plainly irrelevant to the use to which the classifications were used, i.e. to restrict and limit job opportunities of the seniors in favor of the younger workers.

Under the mandate of the A.D.E.A., the Courts should indeed look closely at the lines drawn between older and younger workers by seniority system classifications. Once established and commissioned for that duty, employment opportunities are either denied or extended pursuant to those classifications in a manner totally aside from the merits and relative skills of the individuals.

This issue which bears directly upon the job security of thousands of older employees across this country, should more than provide the required element of importance so as to warrant the issuance of the petitioned Writ of Certiorari.

Finally, both the Trial Court as well as the Court of Ap-

peals failed to acknowledge the inferences fairly arising from petitioners' evidence presented at trial including:

1. the admission of age-prejudice by the Director of Industrial Relations, directly applied to the matter of these vocations. R. 598
2. respondent's concurrent practice of subjecting older workers upon attaining age 62 to a special scrutiny to determine their fitness for continued employment to age 65. R. 561-69
3. a wage trend line analysis (Ex. 22 at trial) and the job-evaluation expert testimony showing that during this same time-frame, the respondent was also administering a wage policy within the Office and Technical Unit, which compensated the older workers at a noticeably lower rate of payment per acknowledged unit of job worth as contrasted with the younger workers. R. 389-466.
4. statistical evidence of age-related groupings between the vocations and depletion of the ranks of the older group at a rate 4 times that experienced by the younger group. R. 233, 268, 339-41, 396, 495

A line of cases wherein lower courts had prevented or upset a jury verdict in civil proceedings under federal statutes, established an exception to the normal rule that certiorari is generally withheld when review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved.

Thus, this 6th reason for granting the writ, alone constitutes an independent and ample cause for the issuance of the writ:

> ". . . the criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected." *Wilkerson* v. *McCarthy*, 336 U.S. 53, 55.

> "Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Beacon Theatres* v. *Westover*, 359 U.S. 500, 501

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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February 5, 1979

APPENDIX A

Nos. 75-2220 & -2282

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HUBERT MORELOCK, et al.,
Plaintiffs-Appellants,

v.

THE NCR CORPORATION,
Defendant-Appellee.

ORDER

(Filed November 9, 1978)

Before: WEICK, ENGEL and MERRITT, Circuit Judges.

No active Judge of this Court having requested that a vote be taken on the suggestion of the appellants that their petition for rehearing be heard en banc, said petition for rehearing was referred to the panel for disposition.

Upon consideration, we are of the view that our opinion in these appeals adequately discussed the issues, and that the petition for rehearing should be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN D. HEHMAN
Clerk.

APPENDIX B

No. 75-2220
No. 75-2282

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HUBERT MORELOCK, et al.,
Plaintiffs-Appellants,

v.

THE NCR CORPORATION,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed October 6, 1978.

Before: WEICK, ENGEL and MERRITT, Circuit Judges.

WEICK, Circuit Judge. This is a private action brought under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.*, against the NCR Corporation (NCR or "Company"). Plaintiffs, Hubert Morelock, William Evans, Eugene Borgerding, Clayton Metcalf and Ralph Saunders[1] are present or former employees of NCR at its Dayton, Ohio facilities who either lost their jobs or feared the loss of their jobs through a reduction in the work force at the Dayton facilities, which reduction commenced on October 13, 1972.

[1] In addition to the above persons, Edward Thompson was also originally a plaintiff in this action. In the Final Pretrial Order, he was dismissed as a party plaintiff.

In essence, they allege that NCR conducted its reduction in the work force pursuant to a seniority system which was not bona fide within the meaning of § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2). They sought *inter alia*, back pay, damages, reinstatement and an injunction enjoining NCR from discriminating against them on the basis of their age.

The District Court denied NCR's motion to strike plaintiffs' demand for a jury trial and ordered the issue of liability to be tried to a jury. Before submitting the case to the jury, the Court reserved NCR's motion for a directed verdict. The jury returned a verdict in favor of each plaintiff. After the verdict was rendered, NCR renewed its motion for a directed verdict and also moved for judgment notwithstanding the verdict (n.o.v.) and in the alternative, for a new trial. The District Court granted the motion for judgment n.o.v. and conditionally granted the motion for a new trial in accordance with the provisions of Fed. R.Civ. Pro. 50(c).

Plaintiffs appealed, assigning as error *inter alia* the trial court's granting of NCR's motions for judgment n.o.v. and a new trial. NCR cross-appealed, raising the additional issues of (1) the propriety of a jury trial in a private civil action brought under the ADEA (2) whether plaintiffs' action was time-barred by the applicable statute of limitations and (3) whether each plaintiff was required to file a written consent to become a party plaintiff in the lawsuit, under the provisions of 29 U.S.C. § 256.[2]

[2] 29 U.S.C. § 256 provides in pertinent part:

> In determining when an action is commenced for the purposes of section 255 of this title, an action commenced on or after May 14, 1947 under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended, or the Bacon-Davis Act, it shall be considered to be commenced in the case of any individual claimant—

The appeal was argued before a panel of this Court on June 16, 1976. In an opinion filed on December 20, 1976, we held that there was no right to a jury trial in a private action under the ADEA. See 546 F.2d 682. Consequently, we found that the jury empaneled by the District Court was in effect, an advisory jury, whose use did not relieve the District Court of its duty to make findings of fact and conclusions of law as required by Fed. R. Civ. Pro. 52. Because the District Court failed to do this, we vacated its judgment and remanded the case to the District Court for the entering of findings of fact and conclusions of law.[3]

Subsequently, plaintiffs filed with this Court a petition for rehearing, with a suggestion for a rehearing en banc. After our denial of that petition, plaintiffs petitioned the Supreme Court for a writ of certiorari.

On February 22, 1978, the Supreme Court announced its decision in *Lorillard* v. *Pons*, 434 U.S. 575 (1978), which held that there is a right to a trial by jury in a private civil action for lost wages under the ADEA. The Supreme Court on March 6, 1978 vacated our judgment in the instant case and remanded the case to us for further consideration in light of *Lorillard* v. *Pons, supra*, 435 U.S. 911 (1978).[4]

Upon the remand to our Court, supplemental briefs were filed and the appeal was argued for a second time before a

(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or

[3] We indicated in our opinion that we would have decided the case on the merits had not the factual details of the appeal been so complex. *Id.* at 689 n. 19.

[4] In the Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256 § 4(a), 92 Stat. 190 (1978), Congress amended § 7(c) of the ADEA, 29 U.S.C. § 626(c) to provide for a "trial by jury of any issue of fact in [a private civil] action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action."

panel of this Court. By reason of the fact that the District Court tried the question of liability to a jury as required by *Lorillard* v. *Pons, supra*, we find that the issues raised by the parties are now ripe for disposition and accordingly, we reach the merits of this appeal.[5]

We hold that this action was timely commenced within the applicable limitations period and that plaintiffs were not required to file written consents to become parties to this action. Furthermore, we affirm the District Court's grant of judgment n.o.v. and therefore, we find it unnecessary to reach the questions raised by plaintiffs with respect to the District Court's conditional grant of a new trial.

[5] Throughout the postjudgment course of proceedings in this case, plaintiffs have repeatedly requested that the District Court be required to render findings of fact and conclusions of law with respect to the grant of judgment n.o.v. Without such findings and conclusions, plaintiffs assert that neither they nor this Court can appraise adequately the properiety of such an order.

Fed. R. Civ. Pro. 52(a) requires findings of fact and conclusions of law to be made in "[i]n all actions tried upon the facts without a jury or with an advisory jury" and "in granting or refusing interlocutory injunctions." The Rule further provides that findings of fact and conclusions of law "are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)." An order granting judgment n.o.v. is not an order in which findings of fact and conclusions of law are authorized by Rule 52. *See Hamilton Foundry & Mach. Co.* v. *International Molders & Foundry Workers Union*, 193 F.2d 209, 213 (6th Cir.), *cert. denied*, 343 U.S. 966 (1952); *cf. O'Brien* v. *Westinghouse Elec. Corp.*, 293 F.2d 1, 8 (3d Cir. 1961) (findings of fact not necessary in granting a motion for a directed verdict).

We note however, that in our opinion, it is the better practice in cases such as the instant case, in which the facts are complex, for a trial court to delineate with specificity its reasons for the grant of judgment n.o.v. rather than merely stating conclusively, as did the District Court here, that there was no substantial evidence to support the jury's verdict. By setting forth its reasons for granting judgment n.o.v., the trial court aids both the parties on appeal and the appellate court in their review of the evidence.

I

NCR is engaged in the production of business machines. Prior to 1972, almost one-half of its work force was employed in its facilities at its headquarters in Dayton, Ohio. During the early 1970's, the products of NCR changed from mechanical business machines to electronic business machines. The Company in 1972, in conjunction with this change in product line and therefore in production operations, embarked upon a "decentralization program" designed to reduce the level of operations at its Dayton facilities. The reductions in its work force which occurred in Dayton as a consequence of decentralization decreased the number of employees there from a peak of approximately 21,000 in 1970 to around 8000 at the time of trial.

Prior to 1964, almost all of NCR's Class "D" employees in the Dayton facilities were in a single collective bargaining unit, represented for purposes of collective bargaining, by the NCR Employees Independent Union of Dayton, Ohio (Union). The National Labor Relations Board (NLRB) in 1964, ordered that this bargaining unit be divided into two bargaining units, namely, an "office and technical employees" bargaining unit and a "production and maintenance employees" bargaining unit. The Union continued as the collective bargaining representative of both units. Plaintiffs, because of the jobs they then held, became members of the office and technical employees' bargaining unit.

The seniority system applicable in 1972 to NCR's office and technical personnel, was derived from collective bargaining agreements entered into between the Company and the Union in 1964 and 1968. That system was based on the concept of vocational seniority. Pursuant to that concept, all of the jobs within the office and technical employees' bargaining unit were divided or grouped into vocational classifications. Seniority accrued by vocation. An employee acquired seniority upon the completion of six months, continuous service with the Company. An employee's seniority

in his vocation was equal to the total amount of his continuous service with NCR. Upon transfer to a new vocation, an employee's seniority in his previous vocation immediately carried over to his new vocation so that his seniority in the vocation to which he was transferred was equal to his total seniority.

Layoffs were conducted on a departmental basis. An employee's seniority gave him certain displacement or "bumping" rights in the event his department was faced with a reduction in its work force. In the event of a reduction in the work force of a department, an employee could not be laid off unless he was the least senior in terms of service in his vocation in that department. An employee laid off in one department had the right to bump an employee with the least seniority in his vocation in the entire bargaining unit.

However, when the laid-off employee had the least seniority in his vocation in the bargaining unit, he still possessed what was known as "time increment bumping" rights. Those rights entitled him to bump an employee having no seniority (i.e., with less than six months' continuous service with the Company) in any other vocation within the bargaining unit and whose job he could perform. If there were no such person, the laid-off employee could displace an employee in any other vocation with six months' to one year's seniority provided he could perform the work. In the event there were no persons in the bargaining unit with six months' to one year's seniority that the laid-off employee was qualified to replace, he could be assigned by the Company to bump an employee whose job he could perform, having one year's to two years' seniority, then two years' to three years' seniority, and so on until all the remaining office and technical employees had more senioritiy than such laid-off employee. However, the laid-off employee was required to bump the employee with the least seniority whose job he could perform.

Plaintiffs, as of October 13, 1972, were all in the vocational classification known as Senior Developmental Electronics Technicians (senior tech). Another classification of elec-

tronics technicians, denominated Developmental Electronics Technicians also existed at that time.[6] These two vocational classifications were created by the 1964 collective bargaining agreement. Prior to that agreement, NCR had but a single classification of electronics technicians and it was the 1964 agreement which provided that electronics technicians already employed by NCR became "senior techs." That agreement further created the new vocational classification of electronics technicians, namely, the junior techs. The classifications were to distinguish between electronics technicians on the basis of skill, ability, and experience. Four of the plaintiffs, (Morelock, Evans, Metcalf and Saunders) were electronics technicians in 1964 and were made senior techs in 1965 when the 1964 agreement became effective. The remaining plaintiff (Borgerding) became a junior tech in 1967 and a senior tech in 1970.

Because both the senior tech and junior tech vocational classifications were in the Research, Development and Engineering Area (RDE Area) as defined by the 1964 collective bargaining agreement, a senior tech laid off from his vocation in a reduction in the work force in his department, could potentially bump back into the junior tech vocation.[7] The

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[6] Developmental Electronics Technicians were referred to as "junior techs" by NCR's Dayton employees. Hereinafter, we also will use that designation.

[7] The 1964 collective bargaining agreement provided that employees in the RDE Area who were laid off from their vocations could bump back into prior vocations in which they had worked in the RDE Area. Thus, a laid-off senior tech who had been a junior tech prior to becoming a senior tech, could bump back into the junior tech vocation provided he had more seniority than the junior tech with the least seniority.

Plaintiffs maintain that the 1964 agreement permitted all senior techs to bump back into the junior tech vocation when they were laid off because one had to be a junior tech prior to becoming a senior tech. Although a statement made by Borgerding on redirect examination supports this position (App. at 665-666), we note that only one of the plaintiffs had been a junior tech prior to becoming a senior tech, namely, Borgerding. The other plaintiffs were all electronics technicians at the time the 1964 agreement became effective and were reclassified as senior techs at that time. There is no evidence other than the opinions of these plaintiffs that they, never having been junior techs, could have bumped into the junior tech vocation under the 1964 agreement. The collective bargaining agreement as we read it, does not so provide. Nevertheless, the effect of the elimination of the right of RDE Area employees to bump back into prior vocations in which they had worked, did work to effectuate a complete segregation between the senior and junior tech vocations by eliminating the rights of senior techs (including Borgerding) who had been junior techs, to revert to that position when they were laid off as senior techs.

1968 collective bargaining agreement, although retaining the two electronics technicians' vocations, made radical changes in the method of acquiring seniority in one's vocation. One of the changes eliminated the right of RDE Area employees laid off from their vocation to bump back to vocations in which they had previously worked in the RDE Area and thereby, for all practical purposes, prevented a laid-off senior tech from reverting to the junior tech vocation in the event of a reduction in NCR's work force.

As a result of a petition filed with the NLRB in 1971, a decertification election was conducted by the NLRB in which a majority of the employees of the office and technical bargaining unit voted to have no collective bargaining agent represent them. During the period prior to the election, NCR had sent letters to all its office and technical employees advising them that in the event the vote resulted in no union representation, the Company would continue to use, among other things, the seniority system established by the 1968 collective bargaining agreement for purposes of determining those workers to be laid off.

In accordance with this assertion, after the decertification of the Union, NCR issued an employee's handbook covering its employment practices for its Dayton office and technical personnel, continuing the seniority provisions of the 1968 collective bargaining agreement, for purposes of layoffs. There were however, minor changes in the time increment bumping rights. Thus, for all practical purposes, the seniority

system derived from the 1964 and 1968 collective bargaining agreements was the seniority system used by NCR to effectuate its decentralization.

It was stipulated at trial that between October 13, 1972 and June 26, 1973, many electronics technicians in both categories were laid off for lack of work, as part of a general large scale reduction in work force at the Dayton facilities. These reductions in the work force were accomplished in exact accordance with the seniority system. Laid-off senior techs were unable to bump into the junior tech vocation because of the division of electronics technicians into two vocational classifications and because of the elimination of the right of RDE Area employees, laid off from their vocations, to bump back to prior vocations in the RDE Area. In the proces of layoffs, the five plaintiffs were affected as follows:

(1) Hubert Morelock lost his position as a senior tech on June 25, 1973, having had the least seniority in that vocation at that time. Upon notification of the layoff, he was sent to the employment office where his time increment bumping rights were used to place him in the position of an order proofreader in the Manual Clerk's vocation. Approximately three months later, Morelock began a one-year sick leave. In September 1974, he retired as totally and permanently disabled.

(2) Eugene Borgerding was laid off as a senior tech on June 25, 1973. The application of his time increment bumping rights placed him in a job as a copy machine operator in the Duplicating Equipment Operators and Clerks vocation. Seventeen weeks later, he was recalled to his former position as a senior tech.

(3) William Evans was never laid off. Instead, he transferred from his position as a senior tech in the Dayton facilities to a position as a senior tech at NCR's Miamisburg, Ohio facility.

(4) Clayton Metcalf did not lose his job as a senior tech. Instead, he was shuffled from one department to another, as he

bumped other senior techs with less seniority. However, at the time of the suit, he had the least seniority among the remaining senior techs and therefore would be the next senior tech laid off.

(5) Ralph Saunders lost his position as a senior tech on March 26, 1973, because he was the least senior in that vocation at that time. The implementation of his time increment bumping rights placed him in a position as a mail sorter in the Manual Clerk vocation. In December 1973, he transferred to NCR's Miamisburg facility as a lab aid. After becoming a junior tech at Miamisburg, Saunders, on October 19, 1974 regained his position there as a senior tech.

II

NCR advances two arguments which it asserts eliminates the necessity for this Court to reach the merits of this appeal. First, it maintains that the District Court erred in denying NCR's motion to dismiss plaintiffs' action as time barerd under § 7(e) of the ADEA, 29 U.S.C. § 626(e), which incorporates the limitations periods (§ 6) of the Portal-to-Portal Act of 1947, 29 U.S.C. § 255. Pursuant to that latter section, suit must be commenced within two years from the date of the discriminatory occurrence. An additional year is added when the discrimination is found to be willful, extending the time limit to three years.

NCR argues that because the essence of plaintiffs' cause of action is the allegation that the Company's seniority system discriminates against NCR employees on the basis of age, plaintiffs' cause of action accrued in 1968, the date when the seniority sytem in effect at the time of the 1972 reductions in force was first adopted. Thus, even if the three-year statute of limitations applicable to willful violation of the ADEA is the appropriate limitations period on the facts of this case, NCR concludes that plaintiffs' action is time barred because plaintiffs did not commence suit until March 4, 1974, more than

three years after the adoption of the alleged discriminatory seniority system. We disagree with this contention.

The adoption of NCR's argument would in effect, emasculate § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), which proscribes the observance of non-bona fide seniority systems. To accept NCR's argument would permit perpetual age discrimination through a seniority system by an employer whose violation had already continued without attack for three years. Thus, for example, an employee hired more than three years after the implementation of a seniority system could never challenge its validity.

We hold that the adoption of a seniority system, if discriminatory as to age, constitutes a continuing violation of the ADEA as long as that system is maintained by the employer. An employee's cause of action for an alleged act of age discrimination caused by a discriminatory seniority system, does not accrue until his employment opportunities are adversely affected by the application to him of the provisions of that seniority system. Thus in the instant case, plaintiffs' cause of action accrued at the time the plaintiffs were laid off from their positions as senior techs. The present action was commenced well within even the two-year limitation period (for non-willful violations of the ADEA).

NCR secondly maintains that the District Court erred in failing to dismiss plaintiffs' action on the ground that plaintiffs failed to file written consents to be parties to the lawsuit as required by 29 U.S.C. § 256. Section 256 is not incorporated by reference into the ADEA, and therefore we fail to see how it could be applicable to age discrimination suits. We note however, that 29 U.S.C. § 216(b) is incorporated by reference into the ADEA, 29 U.S.C. § 626(b), and provides in pertinent part:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No em-

> ployee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

The consent requirement of § 216(b), like that of § 255 is apposite solely to representative actions. Plaintiff's complaint states a separate cause of action for each named plaintiff. Individual relief is sought for each of the plaintiffs. No plaintiff purports to represent anyone other than himself. As this is not a representative suit, there was no need for plaintiffs to have filed "consent[s] in writing." *Wallace* v. *Water Tank Service Co.*, 256 F.Supp. 689, 690 (W.D. Okla. 1966); *Mitchell* v. *Mace Produce Co.*, 163 F.Supp. 342, 346-47 (D. Md. 1958); *MacDonald* v. *Martinelli*, 120 F.Supp. 383 (S.D.N.Y. 1950); *Deley* v. *Atlantic Box & Lumber Corp.*, 119 F.Supp. 727, 728-29 (D.N.J. 1954).

III

The District Court in its order granting NCR's motion for judgment n.o.v., set forth the standard for determining whether judgment n.o.v. should be entered, as follows:

> The standard of inquiry in this circuit is the "substantial evidence" rule. *Solomon* v. *United States*, 276 F.2d 669 (6th Cir. 1960); *Hinton* v. *Dixie-Ohio Express Co.*, 18[8] F.2d 121 (6th Cir.); *Scott* v. *United States*, 161 F.2d 1009 (6th Cir.).
>
> It is clear from the above authorities that the motions must be overruled unless viewing the evidence in the light most favorable to the plaintiff there would be no substantial evidence to support a jury verdict.

Applying that test, the Court concluded:

> A consideration of the evidence presented indicated that three of the plaintiffs, Hubert Morelock, Eugene Borgerding, and Ralph Saunders, were reduced in grade

> in reverse order of seniority during a reduction in force at defendant's plant. Plaintiffs Clayton Metcalf and William Evans were never reduced in rank. No substantial evidence, in this Court's opinion, was presented supporting plaintiffs' contentions of a violation of the Age Discrimination in Employment Act. 29 U.S.C. § 621 *et seq.* There being a lack of substantial evidence, the motion for judgment non obstante veredicto is hereby GRANTED.

Plaintiffs first maintain that the District Court applied an incorrect standard in granting judgment n.o.v. The plaintiffs argue that because the word "substantial" connotes equally well either a qualitative or a quantitative meaning, the trial court's formulation of the test for determining whether to enter judgment n.o.v., evinces an improper weighing of the evidence by that court. We do not agree.

The standard to be applied in determining the propriety of entering judgment n.o.v. has been articulated in many ways. *Simblest* v. *Maynard*, 427 F.2d 1, 4 (2d Cir. 1970); *Boeing Co.* v. *Shipman*, 411 F.2d 365, 374 (5th Cir. 1969); 5A Moore's Federal Practice, ¶ 50.02[1], at 50-25 (2d ed. 1977); 9 Wright & Miller, Federal Practice and Procedure § 2524, at 545-47 (1971).

A number of decisions of this Court[8] as well as other Courts of Appeals[9] have stated that a motion for judgment n.o.v. must be granted unless there is "substantial evidence" in opposition to it. We agree with plaintiffs that the preferred formulation of the test for granting judgment n.o.v. is the so-called

[8] *See e.g., Taylor* v. *Cirino*, 321 F.2d 279, 281 (6th Cir. 1963); *Solomon* v. *United States*, 276 F.2d 669, 672 (6th Cir.), *cert denied*, 364 U.S. 890 (1960); *Hinton* v. *Dixie Ohio Exp. Co.*, 188 F.2d 121, 124 (6th Cir. 1951) (directed verdict).

[9] *See e.g., Fontana Aviation, Inc.* v. *Beech Aircraft Corp.* 432 F.2d 1080, 1084 (7th Cir. 1970); *Business Dev. Corp. of N.C.* v. *United States*, 428 F.2d 451, 453 (4th Cir.), *cert. denied*, 400 U.S. 957 (1970); *Boeing Co.* v. *Shipman*, *supra*, 411 F.2d at 373-77.

"reasonable minds" test.[10] Yet, in light of the precedent supporting the standard used by the District Court, and in view of the fact that there is no evidence on the record which indicates that the trial judge weighed the evidence, we find no prejudicial error. As stated by a leading authority on federal civil procedure:

> Although . . . courts have used other phrases than the one preferred here [namely, the reasonable minds test] to describe the standard of sufficiency of evidence, it is unlikely that there is any real difference in result.

Wright & Miller, *supra* § 2524, at 547. [Footnote omitted].

Plaintiffs next argue that even if the District Court used a proper standard in determining the sufficiency of the evidence, it erred in granting judgment n.o.v. on the facts of this case.

The issue raised by a motion for a judgment n.o.v. is whether there is sufficient evidence to raise a question of fact for the jury. *O'Neill* v. *Kiledjian*, 511 F.2d 511, 513 (6th Cir. 1975). This determination is one of law to be made by the trial court in the first instance. *Id.* In determining whether the evidence is sufficient, the trial court may neither weigh the evidence, pass on the credibility of witnesses nor substitute its judgment for that of the jury. Rather, the evidence must be viewed in the light most favorable to the party against whom the motion is made, drawing from that evidence all reasonable inferences in his favor. *See Gillham* v. *Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976). If, after thus viewing the evidence, the trial court is of the opinion that it points so strongly in favor of the movant that reasonable minds could not come to a

[10] This test has been phrased by this Court as follows: "[A] judgment n.o.v. may not be granted unless reasonable minds could not differ as to the conclusions to be drawn from the evidence." *Gillham* v. *Admiral Corp.*, 523 F.2d 102, 109 (1975), *cert. denied*, 424 U.S. 913 (1976).

different conclusion, then the motion should be granted. *Id.* at 109; *Reeves* v. *Power Tools, Inc.*, 474 F.2d 375, 380 (6th Cir. 1973); 9 Wright & Miller, Federal Practice and Procedure § 2524 (1971). An appellate court when reviewing the trial court's decision is bound by the same standard. *Gillham* v. *Admiral Corp., supra,* 523 F.2d at 109; *O'Neill* v. *Kiledjian, supra,* 511 F.2d at 513.

The ADEA covers persons between the ages of 40 and 65 years of age[11] and makes it unlawful, *inter alia,* for an employer to:

> limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; . . . .

29 U.S.C. § 623(a)(2).

It is further provided in § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), that it is not unlawful for an employer to "observe the terms of a bona fide seniority system . . ., which is not a subterfuge to evade the purposes of this chapter . . . ."

Although not clearly articulated in their briefs on appeal, plaintiffs appear to assert two arguments. First, they apparently maintain that the evidence establishes that NCR's seniority system is not bona fide because the purpose and effect of the creation of two separate classifications of electronic technicians was to create classifications of electronic technicians based solely on age. Plaintiffs further appear to argue that even if the seniority system is bona fide, the evidence shows that NCR used it as a subterfuge to effectuate age discrimination against plaintiffs in the 1972-1973 reductions in force.

[11] In the Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 12(a), 92 Stat. 189 (1978), Congress extended the upper age limit of the ADEA to 70. This change becomes effective on January 1, 1979.

We turn first to the question of whether NCR's seniority system was bona fide. When the evidence is viewed in a light most favorable to the plaintiffs, we are unable to find any evidence which supports a conclusion that the seniority system is not bona fide.[12]

First, the division of NCR electronics technicians into two separate and distinct vocational classifications for purposes of seniority was the result of collective bargaining negotiations conducted between the Company and the Union. The separation commenced by the terms of the 1964 collective bargaining agreement which created the two electronics technicians categories, and was consumated by the 1968 collective bargaining agreement which eliminated the right of RDE Area employees who were laid off, to bump back into prior vocations in which they formerly worked in the RDE Area. There is no evidence in the record which supports a conclusion that either the creation of the two classifications of electronics technicians or the elimination of the rights of senior techs to bump junior techs had their origin in or were maintained for the purpose of age discrimination. To the contrary, the uncontroverted evidence in this case shows that the motive for the creation of two electronics technician vocations was economic, that is, to permit NCR to hire inexperienced technicians at a lower salary than that paid to experienced electronics technicians already in the employ of the Company. The classifications were based not on age, but on skill and ability. App. at 298, 316, 346-47.

There is simply no evidence in the record which indicates a reason for the change by the 1968 collective bargaining agreement, of the bumping rights of the RDE Area employees. Plaintiffs maintain that the testimony of their expert witness, Thomas Nisbet, demonstrates that NCR knew as early as 1964

[12] Plaintiffs do not assert that NCR's seniority system is not bona fide in the sense that it is not authentic or genuine. The evidence is uncontroverted that NCR did have a seniority system and that it literally followed that system in implementing its reduction in force.

of the need for decentralization (with its attendant reduction in force) of its operations at its Dayton facilities. From this fact, plaintiffs argue that the jury was entitled to infer that the alterations in bumping rights effected by the 1968 agreement were made in order to isolate older electronics technicians in the senior tech vocation. However, the record is devoid of any such prescience on the part of NCR. Nisbet's testimony refers to a speech made by one of NCR's department heads, not in 1964 or in 1968 but *in 1974* and dealt with the Company's policies as they existed in 1974. App. at 435-37. In fact, the only evidence in the record shows that the Company was hiring workers during the period between 1964 and 1971, App. at 534, 573, 586, and that decentralization commenced in 1972. App. at 589.

Plaintiffs further point to the fact that the use of the adjectives "senior" and "junior" to describe both the two classifications of electronics technicians and other job classifications is indicia of age discrimination. We do not agree. These words when used in connection with a job description connote job duties and responsibilities rather than age. *See Hodgson* v. *Approved Personnel Service, Inc.*, 529 F.2d 760, 765 (4th Cir. 1975).

Secondly, the uncontroverted evidence shows that there were actual differences between senior and junior techs. The former are more skilled, have greater ability and are expected to exercise more independence and creativity than the latter. In addition, senior techs are expected to assist junior techs when the latter have problems on the job. Senior techs were also paid more than were junior techs.

Plaintiffs' expert witness, Thomas Nisbet, testified that the pay levels of the technical jobs at NCR could be broken down into a point rating system. Under that system, the senior tech vocation was rated at a higher level than the junior tech vocation. Nisbet further testified.

> "Q. In totaling the points to make a job evaluation, is age a factor?

> "A. No, sir, you don't consider the employee at all when you are evaluating jobs. The employee is considered under a merit rating, the individual merit rating system. The job evaluation program is set up to set a value, an equitable value on each specific job so that you pay one job fairly in relation to the other.
>
> "Q. But age is not a factor.
>
> "A. Age is not a factor when you set jobs. . . ."
>
> (App. 454-55)

Thus, the evidence established the fact that the dual classifications of electronics technicians was based on criteria other than age, that is, skill and ability. This is in our opinion, a reasonable and proper means of employee classification.

Thirdly, it is undeniable that NCR's seniority system is facially neutral, that is, its terms do not discriminate on the basis of age. The seniority system applies equally to all senior techs. No senior tech regardless of age, when he is laid off from the vocation, is permitted to bump a junior tech. Moreover, neither the seniority system nor the employment policy of NCR requires an employee to be a specified age in order to be either a senior or junior tech.

Fourthly, the evidence does not establish that the seniority system effectuated a classification of senior techs by age. At all times there were persons in each vocation who were under the age of forty, as well as those who were forty years of age and older.

Borgerding for example, did not become a junior tech until he was 42 years of age. In 1971, three of the 29 junior techs were under the age of 40. On June 1, 1974, eleven of the 18 junior techs were 40 years of age or older. Similarly, there always were persons both protected by and unprotected by the ADEA in the senior tech vocation. For example, during the period between October 13, 1972 and June 26, 1973, 21 senior techs were laid off, fourteen of whom were under the age of forty.

In light of these facts we do not believe that there is even

a scintilla of evidence to support a conclusion that NCR's seniority system is not bona fide.

Furthermore, in our opinion, the evidence when viewed in a light most favorable to plaintiffs, was insufficient to justify submitting to the jury the issue whether NCR maintained the seniority system as a subterfuge to avoid the provisions of the ADEA.

In *United Airlines, Inc.* v. *McMann*, 434 U.S. 192 (1977), the Supreme Court defined the meaning of "subterfuge" as used in the ADEA as follows:

> In ordinary parlance, and in dictionary definitions as well, a subterfuge is a scheme, plan, stratagem, or artifice of evasion. In the context of this statute, "subterfuge" must be given its ordinary meaning and we must assume Congress intended it in that sense.

Id. at 203.

Plaintiffs noted that NCR laid off a larger number of senior techs who also had a higher average age than junior techs, despite the facts that (1) senior techs did substantially the same work as junior techs; (2) senior techs were purportedly more skilled and able than junior techs; and (3) NCR was changing its products line from mechanical business machines to electronic business machines. This reduction resulted in there being employed at the Dayton facility six senior techs, all of whom were over 40 years of age and 14 junior techs. Uncontroverted facts in Final Pretrial Order, App. at 71-72. From this reduction in work force, plaintiffs argue that the jury could reasonably infer that NCR used the separate classification of electronics technicians to rid itself of its older workers.

Plaintiffs reinforce this argument by pointing to three factors which they maintain indicate an age animus on the part of NCR, namely: (1) the fact that Morelock was once turned down for a transfer because a manager felt that at 43 years of age he was too old; (2) the fact the Company had a mandatory retirement program under which employees upon becoming age 62 years were the "subjects of 'special' managerial scrutiny and evaluation," (Plaintiff's Brief at 29); and (3) the fact that pension costs were higher for older workers.

We are unable to accept plaintiffs' contention for two reasons. First, plaintiffs entered into the following stipulation:

> (24) That, during the period commencing October 13, 1972, and ending June 26, 1973, a reduction in force occurred within the Office-Technical Employees Unit described in Paragraph 14, which reduction affected the employees in Vocation 39820–Senior Development Technician. Effective on June 26, 1973, there were six employees working in Vocation 39820–Senior Development Technician, the following employees with the noted seniority and birthdates having been *reduced from such vocation during this period due to lack of work within such vocation.* [Emphasis added]

Uncontroverted Facts in Final Pretrial Order, App. at 71.

A party is bound by what he stipulates. The above stipulation gives the reason why plaintiffs were laid off, namely, there was no work for senior techs. This stipulation in our opinion, should preclude the plaintiffs from claiming that they were laid off for any other reason.

Moreover, even if this stipulation were not as conclusive as we believe it to be, we hold that on the uncontroverted facts of this case, there was no evidence to raise a factual issue to submit to the jury the question whether the seniority system was employed to effect age discrimination. We do not believe that the number of senior techs laid off is so excessive in comparison with the number of junior techs laid off as to conclude that NCR, in laying off its electronics technicians, was discriminating on the basis of age.

The District Court properly entered judgment n.o.v. There is no need for us to discuss the issues raised with respect to its grant of NCR's motion for a new trial.

AFFIRMED.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. 77-172

HUBERT MORELOCK, et al.,
Petitioners,

v.

NCR CORPORATION.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Sixth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of United States Court of Appeals in this cause is vacated with costs; and that this cause is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Lorillard* v. *Pons*, 434 U.S. — (1978).

It is further ordered that the petitioners, Hubert Morelock et al., recover from NCR Corporation One Hundred Dollars ($100) for their costs herein expended.

March 6, 1978

Clerk's costs $100

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO

Civil Action File No. C-2-74-29

HUBERT MORELOCK, et al.,
Plaintiffs,

v.

THE NCR CORPORATION,
Defendant.

JUDGMENT

(Filed 4-16-75)

This action came on for trial before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered.

It is Ordered and Adjudged that the defendant, National Cash Register Company, motion for judgment non obstante veredicto and motion for a new trial is hereby GRANTED. The motion for a new trial is granted conditioned upon the vacation or reversal of this Court's order granting the motion for judgment non obstante veredicto.

The plaintiffs take nothing, that the action be dismissed on the merits.

Dated at Dayton, Ohio, this 16th day of April, 1975.

John D. Lyter,
Clerk of Court
By Rebecca Jane Ellis

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action File No. C-2-74-29

HUBERT MORELOCK, ET AL.,
Plaintiffs,

v.

NATIONAL CASH REGISTER COMPANY,
Defendant.

ORDER GRANTING MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO AND MOTION FOR A NEW TRIAL

(Filed 4-16-75)

This matter is before the Court following trial on the issue of liability to a jury and upon motion by defendant properly made for judgment non obstante veredicto and for a new trial.

The standard of inquiry in this circuit is the "substantial evidence" rule. *Solomon* v. *United States,* 276 F.2d 669 (6th Cir. 1960); *Hinton* v. *Dixie-Ohio Express Co.,* 181 F.2d 121 (6th Cir.); *Scott* v. *United States,* 161 F.2d 1009 (6th Cir.).

It is clear from the above authorities that the motions must be overruled unless viewing the evidence in the light most favorable to the plaintiff there would be no substantial evidence to support a jury verdict.

A consideration of the evidence presented indicated that three of the plaintiffs, Hubert Morelock, Eugene Borgerding,

and Ralph Saunders, were reduced in grade in reverse order of seniority during a reduction in force at defendant's plant. Plaintiffs Clayton Metcalf and William Evans were never reduced in rank. No substantial evidence, in this Court's opinion, was presented supporting plaintiffs' contentions of a violation of the Age Discrimination in Employment Act, 29 U.S.C. Sec. 621 et seq. There being a lack of substantial evidence, the motion for judgment non obstante veredicto is hereby GRANTED.

Defendant seeks also a new trial, urging that irrelevant and immaterial evidence and testimony was presented through defendant witness Thomas Nesbitt. A consideration of Mr. Nesbitt's testimony and Plaintiffs' Exhibit 22 leads to the conclusion that such testimony and exhibit were improperly admitted to the prejudice of defendant. Accordingly, defendant's motion for a new trial is likewise GRANTED.

The procedure to be followed in a determination of this sort may be found in Rule 50(c) of the Federal Rules of Civil Procedure. Accordingly, the motion for a new trial is granted conditioned upon the vacation or reversal of this Court's order granting the motion for judgment non obstante veredicto.

IT IS SO ORDERED.

Carl B. Rubin
United States District Judge

APPENDIX F

PLAINTIFF'S EXHIBIT 20
C-3-74-29

JOB DESCRIPTION 32020
EFFECTIVE 3-1-65

ELECTRONICS DEVELOPMENT TECHNICIAN

Nature and Purpose of Work

Incumbents at this level assist in electronic development and laboratory work by building, assembling, testing, reworking, and troubleshooting electronic equipment utilizing established practices and procedures and an extensive practical knowledge of basic electronic theory.

Typical, but not all-inclusive, are the following duties:

1. Works from blueprints, logical diagrams, schematic diagrams, and verbal instructions in making breadboard and prototype layouts of electronic configurations for experimental or developmental purposes.
2. Builds, assembles, installs, and wires units using judgment in choosing proper wire size, selecting hardware such as cables, connectors, etc., and in properly positioning components in order to keep noise at a minimum.
3. Checks out experimental or developmental units by checking specified values at various points in the circuitry; locates wiring errors, improper placement of components, faulty components such as condensers, transistors, and resistors of improper value.
4. Isolates more complex design errors and communicates the same to higher level personnel for resolution.

5. Following procedural outlines, schematic diagrams, prints and generally accepted practices and procedures, tests and performs functional checkouts of uncomplicated prototypes and models.
6. May be required to correct functional maladjustments of test equipment or to devise, assembly, or modify procedures and knowledge of the test to be performed. same for specific application working from established
7. Uses a full range of test equipment such as bench supplies, metering equipment, voltmeters, ammeters, bridges, oscilloscopes, potentiometers, and electrical recording equipment.
8. Prepares verbal and/or written reports of tests and work performed.
9. In the course of carrying out the regular technical duties, may, on an occasional or incidental basis, make or modify parts utilizing machine tools such as the drill press, lathe, pedestal grinder, saw, and sander, and where the work performed is not normally described as precision-like in nature.

Supervision or Direction Received

Assignments are specific. Work is performed under the direction of engineers or higher level technicians within established practices, procedures, and theories of electronic assembly and testing operations.

Qualifications

Requires an extensive knowledge of basic electronic theory, of laboratory and testing practices, and of electronic test equipment and its application.

APPENDIX G

PLAINTIFF'S EXHIBIT 21
C-3-74-29

CLASSIFICATION NO. 3 2052
NCR CLASS D
EFFECTIVE 3-1-65

SENIOR ELECTRONICS DEVELOPMENT TECHNICIAN

Nature and Purpose of Work

Work at this level involves the independent application of subprofessional and advanced technical knowledge of electronics. Assignments are of such a nature as to require independent technical judgment and creative liability. Requires the ability to work independently from general engineering information and design criteria in constructing, modifying, testing, reworking, and troubleshooting complex electronic systems and instrumentation.

Typical, but not all-inclusive, are the following duties:

1. Works from own knowledge of pertinent logic circuitry, the theory and application of the electronic functioning involved, component values, functional check out methods, the use and limitations of test equipment, as well as from schematic, logic circuitry, verbal instructions, and prints.
2. Collaborates with engineers in developing the physical layout and arrangement of unit or system designs by determining details of construction required; building breadboard models and prototypes; testing, modifying, and adjusting circuits, components, or system until design specifications and performance are verified.

3. Devises, generates circuitry for, and constructs specialized test equipment (requiring a thorough practical knowledge of electronic theory and the test requirements) for component and sub-assembly evaluation and for specific application on more complex electronic equipment.
4. Performs critical unit and systems debugging on early development models.
5. Tests and performs functional check outs of complex prototype or experimental systems for which standard procedures are not established, and, under general direction, dismantles, takes corrective measures necessary, re-assembles, and retests same.
6. May direct the activities of, and supply technical information, sketches, and diagrams to other technician or assemblers engaged in the actual fabrication, construction, assembly, and testing of electronic systems.
7. May plan the sequence of operations and the methods required to completely lay out, fabricate, assemble, package, and test complex electronic units and systems.
8. Prepares verbal and written reports of tests and work performed including preliminary analysis of data and recommendations based on test findings.
9. In the course of carrying out the regular technician duties, may, on an occasional or incidental basis, make or modify parts utilizing machine tools such as the drill press, lathe, pedestal grinder, saw, and sander, and where the work performed is not normally described as precision-like in nature.

Supervision or Direction Received

Carries out broad assignments working in conjunction with engineers or supervisory personnel. Requires a high degree of initiative to act independently and accurately execute instructions in the performance of assigned projects.

Qualifications

Requires a thorough and extensive practical knowledge of electronic theory and associated mathematics; a knowledge of the theory, operation, use and limitations of a complete range of electronic test equipment; and the capacity for independent technical judgment and original thinking.

Supreme Court, U. S.
FILED
MAR 19 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1230

HUBERT MORELOCK, EUGENE BORGERDING, WILLIAM EVANS, CLAYTON METCALF, AND RALPH SAUNDERS

Petitioners,

vs.

THE NCR CORPORATION

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

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IN THE

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OCTOBER TERM, 1978

No. 78-1230

HUBERT MORELOCK, EUGENE BORGERDING, WILLIAM EVANS, CLAYTON METCALF, AND RALPH SAUNDERS

Petitioners,

vs.

THE NCR CORPORATION

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

INTRODUCTION

Respondent, the NCR Corporation, files this Brief in opposition to the Petitioners' Petition for a Writ of Certiorari.

ISSUE PRESENTED

Whether the decision of the Sixth Circuit Court of Appeals affirming the decision of the District Court granting Respondent Judgment n.o.v. is contrary to law?

STATEMENT OF THE CASE

Petitioners' statement of the case is, we respectfully submit, incomplete, inaccurate and misleading in several material respects.

Respondent would state the case as follows:

1. Course of Proceedings

On October 1, 1974, the six original Plaintiffs filed a Notice of Intent to Sue with the Secretary of Labor.

On March 4, 1974, the Complaint was filed by the six original Plaintiffs.

On February 3, 1975, the Court entered its Final Pretrial Order, which included certain Stipulations of Fact and a Stipulation dismissing Plaintiff Edward Thompson (App. A, p. 1a).

Trial to a jury commenced on March 25, 1975, on the limited questions of whether Respondent violated the Age Discrimination in Employment Act, the question of back pay damages having been reserved to the jury for subsequent determination and all issues of special damages and other relief equitable in nature having been reserved to the Court for subsequent determination.

At the close of Petitioners' case in chief, Respondent moved for a directed verdict with respect to Petitioners Metcalf and Evans, which motion was taken under submission, and moved for a directed verdict with respect to all Petitioners, which motion was also taken under submission.

At the conclusion of the case, Respondent moved for a directed verdict, which motion, together with Respondent's previously made motions, was taken under submission. The case was submitted to the jury, and the jury verdict on the limited question presented was returned in favor of the five Petitioners. Thereafter, Respondent renewed its previously made motions for a directed verdict, moved for Judgment n.o.v. and moved for a new trial. At the conclusion of the oral argument respecting such motions, Respondent's Motion for Judgment n.o.v. was granted and Respondent's Motion for a New Trial was conditionally granted.

On September 4, 1975, Petitioners filed their Notice of Appeal to the Sixth Circuit Court of Appeals.

On October 17, 1975, the Respondent filed a Motion to Extend Time for Cross Appeal, which Motion was granted and thereafter, on October 17, 1975, the Respondent filed its Notice of Cross Appeal to the Sixth Circuit Court of Appeals.

On December 20, 1976, the United States Court of Appeals for the Sixth Circuit held that there was no right to a trial by jury in a private action under the Age Discrimination in Employment Act and remanded this case back to the District Court. *Morelock et al.* v. *The NCR Corporation*, 546 F.2d 682 (6th Cir., 1976).

Thereafter Petitioners sought a Writ of Certiorari on the issue of whether a private litigant plaintiff in an action under the Age Discrimination in Employment Act is entitled to a trial by jury in a suit to recover lost wages under the Act. On March 6, 1978, this Court granted Certiorari, vacated the decision of the Sixth Circuit and remanded the case back to the Sixth Circuit Court for further consideration in light of the decision of this Court in *Lorillard* v. *Pons*, 434 U.S. 575 1978. Upon remand the Sixth Circuit held that by reason of the fact that the District Court had tried the case to a jury, as required by *Lorillard* v. *Pons*, (Ibid.), the issues raised by the Petitioners' appeal and Respondent's cross appeal were ripe for disposition. The Sixth Circuit issued its decision affirming the action of the District Court in granting Respondent Judgment n.o.v. and finding against Respondent on the issues raised by the cross appeal. Petitioners sought rehearing en banc which was denied.

2. Statement of Facts

The Petitioners in this action are each present or former employees of the Respondent and worked in its Dayton, Ohio, plant facilities. While employed by the Respondent, each of the Petitioners initially was employed in a bargaining unit which might be best described as an "all employee" bargaining unit (Final Pretrial Order, Uncontroverted Facts, App. A,

Item 13, p. 14a), and were represented for purposes of collective bargaining by The NCR Employees Independent Union of Dayton, Ohio, an exclusive collective bargaining representative pursuant to the provisions of the Labor Management Relations Act, 29 U.S.C. § 141 et seq. (1947).

On September 1, 1964, the National Labor Relations Board divided the aforementioned "all employee" unit into two bargaining units – an "Office and Technical Employees" bargaining unit and a "Production and Maintenance Employees" bargaining unit (Final Pretrial Order, Uncontroverted Facts, App. A, Item 14, p. 15a). Thereafter, the Petitioners were in the "Office and Technical Employees" bargaining unit because of the job classifications they each then occupied (Final Pretrial Order, Uncontroverted Facts, App. A, Item 15, p. 16a) and they continued to be represented for purposes of collective bargaining by The NCR Employees Independent Union of Dayton, Ohio (Ibid.).

As a result of a petition filed with the National Labor Relations Board, an election was conducted by that agency on September 10, 1971, in which the majority of the employees voted to have no labor organization represent them thereafter with the Respondent (Final Pretrial Order, Uncontroverted Facts, App. A, Item 16, p. 16a). During the period commencing December 17, 1968, and ending September 10, 1971, the final collective bargaining agreement between the Respondent and The NCR Employees Independent Union of Dayton, Ohio, was in effect (Final Pretrial Order, Uncontroverted Facts, App. A, Item 18, p. 17a). During the period prior to the NLRB election, because of questions which had occurred, the Respondent sent a letter to all employees in the Office and Technical Employees Bargaining unit advising these employees:

> "Thus, in response to the misrepresentation of the unions as to what would happen to your benefits when you vote "no union," you can be assured that the Company does not intend to reduce or otherwise adversely affect:

> –the present salary structure
> –seniority protection in case of layoff,
> –overtime pay provisions
> –the overall package of employee benefits which currently includes a dental plan, a cost of living provision, hospitalization, major medical, life insurance, salary continuation, pensions, and so on.
>
> • • •
>
> "Finally, a number of employees have asked if the salary structure and pay policies, group benefits, holidays, vacations and other benefits and working conditions will be consolidated in writing and made available to employees in the event they select no union. In a number of NCR locations such as Millsboro where office and technical personnel are not represented by a union, such a booklet is supplied to employees and there is no reason why this would not be the case here in Dayton." (Joint Exhibit III, Final Pretrial Order, Uncontroverted Facts, App. A, Item 19, p. 17a)

Following September 10, 1971, the Respondent issued an "Employees Handbook for NCR Dayton Office and Technical Personnel". This handbook contained the employment policies of the Respondent which would be applicable to employees in the Office and Technical Employees Unit. The same subjects normally found in a negotiated collective bargaining agreement were set forth in this Employee Handbook, (see Plaintiffs' Exhibit 7, App. B, pp. 26a-67a).

As indicated above, each of the Petitioners in this action is a present or former employee of the Respondent. A summary of the employment history of each Petitioner establishes the following:

1. Hubert C. Morelock was initially employed on November 10, 1948. While employed by the Respondent he worked in several job classifications including Senior Electronic Development Technician, worked in several vocations including Electronics Laboratory which was renamed Senior De-

velopment Technician, and worked in thirteen different departments at the Respondent's Dayton, Ohio, plant complex (Final Pretrial Order, Uncontroverted Facts, App. A, Item 6, p. 7a). On November 22, 1973, Petitioner Morelock commenced a sick leave and thereafter, on November 23, 1974, at his request was retired by the Respondent under the total and permanent disability provisions of the NCR Employee and Family Group Benefit Plan No. 3 (Final Pretrial Order, Uncontroverted Facts, App. A, Item 8, p. 9a).

2. Eugene F. Borgerding was employed on September 4, 1950. While employed by the Respondent, he worked in several job classifications including Electronic Development Technician, Senior Electronic Development Technician, worked in several vocations including Computer Unit Technician Grade A (which was renamed Development Technician), and Electronic Development Technician (which was renamed Senior Development Technician), and worked in ten different departments at the Respondent's Dayton, Ohio, plant complex (Final Pretrial Order, Uncontroverted Facts, App. A, Item 9, pp. 9a-10a).

3. William O. Evans was employed on June 5, 1947. While employed by the Respondent he worked in several job classifications including Senior Electronic Development Technician, worked in several vocations including Electronic Laboratory Technician (which was renamed Senior Development Technician), and Process and Materials – Senior Development Technician, and worked in eleven different departments at the Respondent's Dayton, Ohio, plant complex (Final Pretrial Order, Uncontroverted Facts, App. A, Item 10, pp. 10a-11a).

4. Clayton Metcalf was employed on April 10, 1947. While employed by the Respondent, he worked in several job classifications including Senior Electronic Development Technician, worked in several vocations including Senior Development Technician, and worked in twelve departments at the Respondent's Dayton, Ohio, plant complex (Final Pretrial Order, Uncontroverted Facts, App. A, Item 11, pp. 11a-12a).

5. Ralph Saunders was employed on July 6, 1953, in a branch office of the Respondent as a Service Representative not connected with the Dayton, Ohio, plant complex. On October 8, 1956, he transferred to the Dayton, Ohio, plant complex. While employed by the Respondent at its Dayton plant complex he worked in several job classifications including Senior Electronic Development Technician, worked in several vocations including Technician Electronic Laboratory (which was renamed Senior Development Technician), and worked in ten different departments at the Respondent's Dayton, Ohio, plant complex (Final Pretrial Order, Uncontroverted Facts, App. A, Item 12, pp. 12a-13a).

The "seniority system" which governed the movement of the Petitioners and all other employees employed at the Respondent's Dayton, Ohio, plant complex in the Office and Technical Employees bargaining unit was a system evolving throughout the period these employees were represented for purposes of collective bargaining by a labor organization certified to be their exclusive collective bargaining representative by the National Labor Relations Board and set forth initially in the several successive collective bargaining agreements and finally in the Employee Handbook (Petitioners' Exhibit 7, App. B, pp. 26a-67a).

It was stipulated before the District Court that, commencing October 13, 1972, a reduction in the total work force in the Office and Technical Employees unit occurred due to lack of work (Final Pretrial Order, Uncontroverted Facts, App. A, Item 24, pp. 18a-19a). During the period commencing October 13, 1972, and ending June 26, 1973, 21 of the employees in the Senior Development Technician vocation were laid off from this vocation due to lack of work, including three of the Petitioners, Ralph Saunders (3/26/73), Hubert Morelock (6/25/73), and Eugene Borgerding (6/25/73), and then on June 26, 1973, there were but six individuals remaining in this job vocation. Of the 21 individuals laid off from this job vocation, 14 were at the time of their layoff under the age of 40, and seven were at the time of their layoff over the age of

40 (Ibid.). The reductions which were occurring affected the entire work force of the Respondent at its Dayton, Ohio, plant complex. In 1970 the total employment at the Dayton plant complex was over 21,000. Prior to 1971 the Respondent had been in a hiring mode. The number of employees being hired and the reductions which took place starting in 1971 were not anticipated at any time prior to 1971. In 1975, at the time of the trial, there were approximately 5,500 total employees working at the Dayton plant complex.[1]

Respondent takes exception to certain specific statements set forth in Petitioners' Brief in support of their Petition for Writ of Certiorari and respectfully submits that the "conclusions" advanced by Petitioners are totally unsupported on the record.

At page 7 of their Brief, Petitioners state:

> "The 1965 bisecting of the development electronic technicians into two classes remained largely insignificant in terms of the employment opportunities extended to the older technicians by virtue of company rules in the seniority scheme whereunder a senior technician displaced by a work force reduction could displace in turn a junior technician with less years with the company.
>
> "In 1968, however, that latter provision was eliminated thereby serving to completely isolate the older group from the employment opportunities extended to the younger group of technicians.
>
> "Following a device called "time-increment bumping," highly skilled senior technicians when displaced from such work as result of a work force reduction, were given

[1] In Petitioners' Brief to this Court, Petitioners have stated that employment at the Respondent's Dayton facilities went from approximately 21,000 to 8,000 (Brief, p.6). There is no record cite for this statement, and our review of the record indicates that such figures are not contained in the record. In point of fact, total employment at the Respondent's Dayton facilities was approximately 5,500 at the time of trial, March, 1975.

> assignments such as a xerox machine operator, in the case of Petitioner Eugene Borgerding (R. 66), or that of a manual clerk, in the case of Petitioner Hubert Morelock (R. 64), or as a mail sorter in the case of Petitioner Ralph Saunders (R. 68), which assignments were fully alien to their "family of vocations" and which work to them was understandably very demeaning and humiliating as well as financially unrewarding."

The evidence on the record is clear and undisputed regarding what the facts were regarding the complex seniority system which existed in the Office and Technical Employees bargaining unit and its evolvement over the years.

Prior to the 1964 collective bargaining agreement and pursuant to the provisions of this agreement, all technicians, like Petitioners, possessed the following seniority rights in the event of any reduction in the number of employees in the job classification in which they were working. Initially, the employee with the least amount of job classification seniority[2] in the job classification in the department in which the reduction took place was the employee laid off from the job classification. This employee could then exercise vocational seniority[3] to displace the least senior employee working in any job classification in the same vocation, in the same department in which the reduction took place, provided the least senior employee has less vocational seniority than the employee desiring to exercise these seniority rights. If the laid off employee could not exercise vocational seniority rights against any individual in the same department, the laid off employee could exercise vocational seniority to displace the least senior

[2] Total length of time employed in a job classification.

[3] "Vocation" is the term used to define a family of several job classifications in which substantially similar job skills were involved. "Vocational seniority" is the term used to define the total length of time employed in a vocation. The grouping of job classifications into vocations was negotiated and set forth in the collective bargaining agreement.

employee working in any job classification in the same vocation in any other department provided the least senior employee had less vocational seniority than the employee desiring to exercise these seniority rights. If the laid off employee could not exercise such vocational seniority rights, the employee could exercise company seniority[4] against the least senior employee working in any job classification in which the laid off employee had previously held job classification seniority starting with the last job classification in which the laid off employee had worked back to the first said job classification, provided the least senior employee had less company seniority than the employee desiring to exercise these company seniority rights. If the laid off employee could not exercise such company seniority rights the employee was laid off from the active working payroll.

The 1964 collective bargaining agreement remained in effect until 1968. In 1968, the Respondent and the labor organization negotiated changes in the "company seniority rights". Under the 1968 agreement, the last bump described above – to a job classification in which the laid off employee had previously held seniority – was eliminated and was replaced by much broader seniority rights which were denominated "time-increment bumping rights."[5] In exercising time-increment bumping rights, the laid off employee could displace any employee within the time increment group open for bumping against at the time without regard to job classification, vocation or department so long as the employee desiring to exercise such seniority rights: (a) had more company seniority than the employee being displaced; and (b) could reasonably

[4] Total length of continuous employment with Respondent.

[5] The entire Office and Technical Employees unit work force was divided into six months time-period time-increment groups without regard to either department, vocation or job classification. All employees with from zero to six months company seniority were in one group. All employees with from six months to one year company seniority were in the next group and so on throughout the entire unit.

be expected to be able to perform the work of the job classification to which such employee was exercising such seniority rights. A time-increment seniority group was considered open for bumping against so long as there were any employees in the group. Once all of the employees in a particular time-increment seniority group were laid off from the plant, the entire next higher time increment seniority group was open for bumping against, and so on.

In 1964, as part of the negotiations which took place for the collective bargaining agreement, the Respondent and the labor organization which represented the employees established several new job classifications, including the job classification, "Senior Electronic Development Technician" and several new vocations, including the vocation "Senior Development Technician."[6] The employees, including all Petitioners except Eugene Borgerding who was then not in a Development Technician job classification or vocation, then working in the various job classifications which were combined and/or renamed "Senior Electronic Development Technician" were automatically upgraded to this new job classification and placed in this new vocation. In addition, during such negotiations several new job classifications, including the job classification "Electronic Development Technician" and several new vocations including the vocation "Development Technician" were established. As reflected by the job description for these job classifications (see Appendix F and G; Petitioners' Brief, pp. 26a-30a), the Senior Electronic Development Technician job classification was a higher rated position and required individuals in it who were more highly skilled than the individuals working in the Electronic Development Technician job classification.

Petitioners indicate that employees in the Senior Develop-

[6] As noted before, the Respondent was in a hiring mode at the time this change was negotiated; the Respondent's peak employment not being reached until 1971, approximately seven years after these negotiations took place.

ment Technician vocation in 1965 had the right to displace employees with less seniority working in the Development Technician vocation. This is incorrect. As indicated above, the only way an employee in the Senior Electronic Development Technician job classification who was also the least senior employee in the Senior Development Technician vocation in the plant could displace the least senior employee in the Development Technician vocation was if such employee had previously held company seniority rights in the Development Technician vocation. It is stipulated fact that only Petitioner Eugene Borgerding held such seniority rights at any time (Final Pretrial Order, Uncontroverted Facts, App. A, Item 9, pp. 9a-10a).

Petitioners, in their Brief, at page 7, in their discussion regarding time-increment bumping rights, totally disregard the fact that an employee who was exercising bumping in a particular time-increment seniority group was already the least senior employee: (a) in his job classification; (b) in his vocation in the same department; and (c) in his vocation in the plant.

Petitioners also assert that the Respondent's negotiated seniority system with its job classifications served to completely isolate a so-called "older" group from the employment opportunities extended to a so-called "younger" group of technicians.

The evidence is undisputed in the record. The Senior Development Technicians were not isolated from the Development Technicians and, in fact, were accorded broader seniority rights – time-increment bumping rights across all vocations – because of the changes negotiated in 1968. In addition, the Uncontroverted Facts established that there were employees both over and under the age of 40 in both the Senior Development Technician vocation and the Development Technician vocation. It is, therefore, we respectfully submit, grossly misleading to this Court for Petitioners to state as part of its Statement of the Case that the Senior Development Technicians were "older" and the Development Technicians were

"younger," when such statement is totally contrary to stipulated Uncontroverted Facts.

REASONS FOR DENYING THE WRIT

I. The decision of the Sixth Circuit Court of Appeals affirming the decision of the District Court granting Respondent Judgment n.o.v. is not contrary to law.

This case presents no new or novel questions of law for the Court to decide. The legal issues present are not issues regarding which there is any disagreement in the Circuits. Indeed the legal principles involved have long since been laid to rest by this Court.

While the case arises under the Age Discrimination in Employment Act, this fact does not distinguish it from any other case involving other statutes in the posture it is at this stage of the proceedings.

This case was tried to a jury. Most of the operative facts were uncontroverted and stipulated. The jury did return a verdict for the Petitioners. Respondent did make proper motions for a directed verdict both at the close of Petitioners' case and at the close of the case and prior to its submission to the jury. The District Court did reserve ruling on these motions. Respondent did make a proper motion for Judgment n.o.v. after the jury verdict was announced and did make a proper motion for a new trial. The District Court did grant the motion for Judgment n.o.v. and conditionally granted the motion for a new trial, all as permitted by the Rules.

It is well settled that the granting of a motion for Judgment n.o.v. does not violate the Seventh Amendment guaranty of a trial by jury. *Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317 (1967). It is equally well settled that a motion for Judgment n.o.v. can be granted when, as a matter of law, the opponent of the mover fails to make a case. *Montgomery Ward and Co.* v. *Duncan*, 311 U.S. 243 (1940).

Questions of fact are for the jury and questions of law are

for the court, *Dimick* v. *Schiedt*, 293 U.S. 474 (1935). We submit that, especially in age discrimination cases, this dichotomy between "law" and "fact" is too simplistic. There are clearly rules of "law" which it is the province of the court to enforce. These rules of "law," we submit, are the rules which the District Court did apply in this matter to grant Judgment n.o.v.

The facts in this matter were sufficiently clear and, in the main, were stipulated facts. The law required a judgment in favor of the Respondent, as there was no evidence of a violation of the Age Discrimination in Employment Act on the record to require this matter to have been submitted to the jury.

The question of whether the evidence in a case is sufficient to create an issue of fact for submission to a jury is solely a question of law to be determined by the court. *United States ex rel. Weyerhauser Co.* v. *Bacon Construction Co.*, 430 F.2d 420 (5th Cir., 1970); *Glazer* v. *Glazer*, 374 F.2d 390 (5th Cir., 1967), cert. denied 389 U.S. 831; *Wilken* v. *Sunbeam Corp.*, 377 F.2d 344 (10th Cir., 1967), cert. denied 389 U.S. 973.

The test of sufficiency of evidence warranting submission of a case to a jury as opposed to directing a verdict by the court was recently stated by the Second Circuit Court of Appeals as follows.

> "[W]hether the evidence is such that without weighing the credibility of the evidence or otherwise considering the weight of the evidence there can be but one conclusion as to the verdict that reasonable men could have reached." *Simblest* v. *Maynard*, 427 F.2d 1, 4 (2d Cir., 1970) (Timbus A. Opin.)

As the standard for granting Judgment n.o.v. is precisely the same as the standard for directing a verdict (9 Wright and Miller, Federal Practice and Procedure, Sec. 2524, 541), we submit that the District Court did apply the proper test, did not engage in any quantitative weighing of the evidence, and reached a proper conclusion.

The Complaint filed by the Petitioners in this matter is specific. It alleges that the Respondent violated the Petitioners' rights under the Age Discrimination in Employment Act of 1967 by limiting, segregating or classifying the Petitioners in a way which affected the Petitioners' status as employees because of their age.

The sole factual or legal issue raised by the Petitioners' Complaint with respect to the question of liability is whether the Respondent did, in fact, limit, segregate or classify the Petitioners in a way which affected the Petitioners' status as employees because of their age, in violation of the Age Discrimination in Employment Act of 1967, or, worded another way, whether the seniority system applicable to the employees in the Office and Technical Employees bargaining unit was established and maintained to discriminate against employees between the ages of 40 and 65 because of their age.

The uncontroverted evidence introduced at the hearing establishes that *the placement of the Petitioners in the job vocation Senior Development Technician (or its predecessor vocation denominated with a different name) was made at a time when three of the Petitioners were under the age of 40 and two of the Petiitoners were 40 years old or older* (Final Pretrial Order, Uncontroverted Facts, App. A, Items 3, p. 6a; 6, pp. 7a-8a; 9, pp. 9a-10a; 10, pp. 10a and 11a; 11, pp. 11a and 12a and 12, pp. 12a and 13a). The Uncontroverted Facts in this regard reveal the following:

> Petitioner Hubert C. Morelock was born on November 22, 1927 (Final Pretrial Order, Uncontroverted Facts, App. A, Item 3, p. 6a). Thus, he was age 33 when he initially became a technician on March 10, 1958, which vocation thereafter was renamed Senior Development Technician (Final Pretrial Order, Uncontroverted Facts, App. A, Item 6, p. 7a-8a).
>
> Petitioner Eugene Borgerding was born on June 20, 1924 (Final Pretrial Order, Uncontroverted Facts, App. A, Item 3, p. 6a). Thus, he was age 44 at the time he

initially became a Senior Development Technician on March 3, 1969 (Final Pretrial Order, Uncontroverted Facts, App. A, Item 9, pp. 9a-10a).

Petitioner William Evans was born on May 1, 1929 (Final Pretrial Order, Uncontroverted Facts, App. A, Item 3, p. 6a). Thus, he was age 27 on December 3, 1956, when he was initially classified as an Electronic Lab Technician, which vocation was subsequently renamed Senior Development Technician, (Final Pretrial Order, Uncontroverted Facts, App. A, Item 10, pp. 10a-11a).

Petitioner Clayton Metcalf was born on June 16, 1924 (Final Pretrial Order, Uncontroverted Facts, App. A, Item 3, p. 6a). Thus, he was age 40 on December 7, 1964, when he initially became a Senior Development Technician, (Final Pretrial Order, Uncontroverted Facts, App. A, Item 11, pp. 11a-12a).

Petitioner Ralph Saunders was born on October 25, 1920 (Final Pretrial Order, Uncontroverted Facts, App. A, Item 3, p. 6a). Thus, he was 35 years old on October 8, 1956, when he became a technician, which vocation was thereafter renamed Senior Development Technician (Final Pretrial Order, Uncontroverted Facts, App. A, Item 12, pp. 12a-13a).

The Petitioners contend that their placement in the job vocation Senior Development Technician was a violation of the Age Discrimination in Employment Act. We respectfully submit that, as a matter of law, there was no evidence on the record to support such a contention. In point of fact, the evidence is clear that the establishment of this seniority system and the job vocations utilized in this system and the relationship of the seniority rights of all employees within the Office and Technical Employees unit was negotiated with an exclusive collective bargaining representative in good faith. There is *no* evidence on the record to indicate that this seniority system was established with *any* consideration given to

the chronological age of any of the employees within the unit.

Section 623(A) of Title 29 of the United States Code in part states as follows:

> "It shall be unlawful for any employer to . . . discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age; to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's age. . ."

The evidence is clear – the Petitioners and all others in the job vocation Senior Development Technician were not placed in such vocation because of their age! *There is absolutely no evidence on this record which indicates or tends to indicate that any of the Petitioners (or any of the other individuals in this job vocation) were placed in this job vocation for any reason related in any way to their age.* Indeed, the evidence submitted by the Petitioners establishes that *the job vocation* which the Petitioners were in *was in existence for years prior to 1964*, and that as a result of the negotiations in 1964 this job vocation was renamed to its present name – Senior Development Technician. Likewise, there is absolutely no evidence on the record to indicate that the job vocation "Development Technician," *a new vocation* established as a result of the 1964 negotiations, was *established for any reason which in any way related to the age of individuals who might be placed in this classification after its establishment or that age was a factor in the placement of individuals in this vocation after it was established.* In this regard, it is undisputed that Petitioner Eugene Borgerding was 42 years old on January 1, 1967, the date of his initial placement in the Development Technician vocation. Such being the case, how can he seri-

ously contend that this vocation was established to segregate workers under the age of 40?

While the total number of individuals in the Senior Development Technician vocation in 1964 or in 1968 is not in the record, it is known that there were substantially more individuals in this vocation than the five Petitioners. It is undisputed that later, on December 31, 1970, there were 43 individuals in this vocation (Final Pretrial Order, Uncontroverted Facts, App. A, Item 21, p. 18a). Of these 43 individuals in this vocation at that time, 29 *were at the time of the commencenment of this action* (some three plus years later) *then over the age of 40, and 16 were then under the age of 40.* Such being the case, it cannot be said that this constitutes any evidence that the placement of individuals in this vocation was based on the age of individuals in the vocation. Indeed, we submit that, *as a matter of law, it can be said that the fact that 29 of 43 individuals in a vocation are over the age of 40 is not evidence that this vocation was established or that the individuals were initially placed in this vocation as a method to segregate or classify workers over the age of 40.* This, we believe, is also the conclusion reached by the District Court which was affirmed by the Court of Appeals.

Each of the Petitioners was or is a Senior Development Technician. It is undisputed that each Petitioner, with the exception of Petitioner Eugene Borgerding, had no prior employment in the Development Technician job vocation (Final Pretrial Order, Uncontroverted Facts, App. A, Items 6, pp. 7a and 8a; 9, pp. 9a and 10a; 10, pp. 10a and 11a; 11, pp. 11a and 12a and 12, pp. 12a and 13a). Yet, the Petitioners claim they were discriminated against because the Respondent: (a) did not have the Senior Development Technician and the Development Technician vocations within a single vocation (contending this was discrimination in violation of the Act); or (b) because the seniority system in effect did not permit employees in the Senior Development Technician job vocation to bump back into the Development Technician vocation; that is, bumping rights which, with the exception of Eugene

Borgerding, none would have ever possessed under any of the agreements or seniority systems in effect covering the Office and Technical Employees unit employees because they had not previously held seniority in the Development Technician job vocation. In sum, the Petitioners did not like the negotiated seniority system, but offered *no* evidence that this seniority system for the employees in the Office and Technical Employees unit was established or maintained to discriminate against employees in the protected age group or with any consideration given to the chronological age of the employees in determining their placement or seniority rights!

We submit that not even a scintilla of evidence exists on this record that the Respondent has engaged in any discriminatory conduct against the Petitioners with either the method of classification or the seniority system utilized. While the Petitioners argued that they were classified Senior Development Technicians because of their age, there is *no* evidence on the record to support this contention. It is but a naked assertion, totally unsupported by any evidence on the record. The District Court properly recognized this fact. In addition, *it is uncontroverted that the two vocations* involved in this proceeding, by the testimony of the Petitioners' own witnesses – the Senior Development Technician and the Development Technicians – *were negotiated* vocations, and that the *creation of the two vocations where one had existed previously took place as a result of negotiations which required the mutual agreement of the then exclusive collective bargaining representative of the Petitioners* and all other employees in the Office and Technical Employees bargaining unit.

It is also not controverted that the vocation system in effect covering the employees in the Office and Technical Employees bargaining unit in no way has been designed or patterned to limit or classify employees over 40 in one vocation and employees under 40 in other vocations. It is uncontroverted that *there were individuals both over and under the age of 40 in virtually all vocations in the Office and Technical Em-*

ployees unit and that this was true even after the substantial reductions in the work force occurred, reductions which occurred due to lack of work and reductions which, according to the Petitioners' own witnesses, have eliminated employees with less seniority in line with their seniority from the active working payroll at the plant. How can it be said that this is evidence that the Respondent was attempting to rid itself of employees who were within the protected age group? *It was stipulated that of the 21 individuals removed from the vocation Senior Development Technician during the period after the reductions commenced through to the date of the removal* of the last Petitioner removed, *14 were then under the age of 40 and seven were over the age of 40* (Final Pretrial Order, Uncontroverted Facts, App. A, Item 24, pp. 18a-19a). In sum, the evidence offered by the Petitioners establishes that, in fact, *there was absolutely no discrimination in the method of developing the vocation system and that there was no evidence that the vocations, as negotiated and as in use at all times material to this case, were grounded in any way on discriminatory motives related to the age of the individuals in the vocation.*

The only evidence on the record regarding discrimination by the Respondent against the Petitioners *because of their age* offered by the Petitioners was the *testimony of the Petitioners themselves* regarding their personal feelings (their unsupported opinions) about the system and their personal convictions *that it was intended to discriminate against workers because of their age.* This testimony, we submit, is not evidence of fact, is contrary to stipulated facts, and, as a matter of law, was not sufficient evidence to support the finding of the jury. Succinctly stated, as a matter of law, *the testimony offered by the Petitioners of their feelings is not evidence of discrimination* in violation of the provisions of the Age Discrimination in Employment Act of 1967.

The Petitioners argued at the trial that the Respondent desired to rid itself of older workers – presumably workers over the age of 40 – because such workers represented a higher

cost to the Respondent. The only evidence offered in support of this argument of the Petitioners was the testimony adduced from witness B. Lyle Shafer, vice president of the Respondent who was an adverse witness called by the Petitioners. Mr. Shafer specifically disavowed this theory, indicating that studies of the Respondent indicated that no generalizations could be drawn regarding the cost of a worker to the Respondent as related to his age, as several factors went into determining the total cost of a worker to the Respondent and that, *while past service pension benefit costs in the event of a pension increase might be higher for a worker over the age of 40, the hospitalization or other medical benefit programs would represent a higher cost for a worker under the age of 40 with dependent children.* In sum, there was no evidence whatsoever offered that the Respondent had a discriminatory motivation to rid itself of workers over the age of 40 because of a cost or potential cost such workers represented to the Respondent.

Accordingly, we submit that as a matter of law a motion for directed verdict should have been granted at the close of the Petitioners' case in chief, the Petitioners having failed to produce any evidence that they were discriminated against by the Respondent and *having clearly established that they were treated exactly the same as all other individuals either over or under the age of 40 working in the same vocation and/or in the Office and Technical Employees bargaining unit.*

Section 623(F) of Title 29 of the United States Code provides in part:

> "It shall not be unlawful for an employer . . . (1) to take any action otherwise prohibited under subsection (A) . . . where the differentiation is based on reasonable factors other than age; [or] (2) to observe the terms of a bona fide seniority system . . . which is not a subterfuge to evade the purposes of this Chapter . . . or to discharge . . . an individual for good cause."

The Respondent produced evidence that it did not limit, segregate or classify its employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect such individual's status as an employee because of such individual's age. This was discussed above. Notwithstanding this, the Respondent also produced evidence, both in the presentation of its case and as a result of cross examination of Petitioners' witnesses, that the differentiation in classifications – and in this regard we refer to all of the job classifications and vocations within the Office and Technical Employees bargaining unit – was based upon factors totally unrelated to the age of the individual placed in such vocation or classification. Specifically, with respect to the two vocations involved in the instant matter, the job descriptions placed in evidence by the Petitioners, *Petitioners' Exhibits 20 and 21*, (App. F and G Petitioners' Brief, pp. 26a-30a) *establish that there are differences in the two vocations, differences totally unrelated to age, and differences based upon reasonable factors other than age, specifically factors relating to the initiative, responsibility and level of work required of individuals in the two vocations.* In addition, Petitioners' witness Thomas Nesbitt, an individual presented as an expert by the Petitioners, acknowledged that the Respondent utilizes a point value rating system to determine the pay level of all jobs within the Office and Technical Employees bargaining unit and that, utilizing norms established by organizations external to the Respondent (the Hay Point System) *the vocation Senior Development Technician was valued as a level 9 job and the vocation Development Technician was valued as a level 7 job.* We submit that this evidence establishes that, as a matter of law, the *differentiation between the two vocations is based on reasonable factors other than age*, and that the Petitioners are bound by this testimony from their expert. This evidence establishes that there are differences, *differences in skill level, differences in responsibility, and differences in work performed between the two vocations involved.* In addition to this, Mr. Nesbitt acknowledged

that age was not a factor in establishing the point values for job vocations:

> "Q. [Mr. Savage] In totaling the points to make a job evaluation is age a factor?
>
> "A. No, sir, you don't consider the employee at all when you are evaluating jobs. The employee is considered under a merit rating, the individual merit rating system. The job evaluation program is set up to set a value, an equitable value on each specific job so that you pay one job fairly in relation to the other.
>
> "Q. But age is not a factor.
>
> "A. Age is not a factor when you set jobs . . ."

There is absolutely no evidence on the record which indicates that the two vocations were not established based on reasonable factors other than age. In point of fact, the evidence is exactly the opposite – age had absolutely nothing to do with the establishment of the two job vocations at issue (or any other job vocation in the Office and Technical Employees unit). The District Court recognized this fact.

The Respondent further took the position and produced testimony that its seniority system for all Office and Technical Employees was a bona fide seniority system within the meaning of that term under Section 623(F) of Title 29 of the United States Code, as paraphrased above.

There is absolutely no evidence on the record that the seniority system utilized by the Respondent with respect to the Office and Technical Employees unit was not operated in good faith, was operated with fraud or deceit, or was operated other than exactly as claimed or as appearances indicated. In addition, there is absolutely no evidence on the record that the Respondent did not consider equally all employees irrespective of their chronological age, differentiating only based upon their length of service with the Respondent. Specifically, the evidence is quite clear that the seniority system utilized covering the Office and Technical Employees unit since 1968

provided preferences in employment based upon length of service with the Respondent in job classifications, vocations or with the company and did *not* consider differently employees based upon their chronological age. ***The Petitioners offered no evidence whatsoever that the seniority system in effect differentiated between individuals in the same vocations based upon their chronological age and, in fact, the testimony from the Petitioners themselves establishes that the differentiations were based solely upon seniority – length of service with the Respondent.*** The Respondent produced testimony from Mr. Robert Howlett, an expert, testimony which is uncontroverted on the record, that the seniority system of the Respondent's Dayton plant complex covering the Office and Technical Employees unit was a bona fide seniority system under the Age Discrimination in Employment Act. In addition to this, the Petitioners themselves acknowledged during their testimony and the Uncontroverted Facts agreed upon by the parties establish that *all* reductions from the Senior Development Technician vocation affecting the Plaintiffs and all other individuals in this vocation concerning whom they had knowledge, were based upon the principle of seniority with the least senior individual being the individual reduced without regard to the chronological age of such individual. Accordingly, we submit that substantial evidence on the record exists to establish, as a matter of law, that the seniority system utilized by the Respondent was a bona fide seniority system as that term is utilized in Section 623, Title 29 of the United States Code. This we submit is also a conclusion reached by the District Court.

Accordingly, we respectfully submit that, as a matter of law, substantial evidence on the record exists to support the position of the Respondent that its job placement was not unlawful and that the Petitioners, as a matter of law, were not discriminated against by virtue of the specific language of Section 623(F) of Title 29 of the United State Code.

The Respondent recognizes that discrimination is a general failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored. However, to be free of discrimination does not require identity of treatment. It only requires that classification rest on real and not feigned differences. We submit that, as a matter of law, the Petitioners did not produce evidence that they were discriminated against. The distinctions afforded the Petitioners, and all others similarly situated, were afforded based upon seniority and were not afforded as a result of the chronological age of the Petitioners or any other individuals similarly situated. The job vocation and seniority system in fact was based on real differences, differences acknowledged by the testimony of the Petitioners and evidence offered by the Respondent's witnesses.

The Judgment n.o.v. entered by the District Court was proper, as a matter of law, as there was no evidence on the record to support the claims of the Petitioners that they were discriminated against and for the further reason that substantial evidence on the record did exist to establish that the Respondent did not commit any discriminatory, unlawful conduct in violation of the Age Discrimination in Employment Act and, in fact, complied with the Act in the implementation and application of the bona fide seniority system which was applicable to the Office and Technical Employees unit. Succinctly stated, there was a complete absence of probative evidence on the record to support the verdict of the jury and it was proper for the District Court to enter Judgment n.o.v.

II. The issue raised by Petitioners regarding the question of whether the McDonnell Douglas tests are applicable in actions arising under the Age Discrimination in Employment Act is not present in this case.

Petitioners have attempted to show that a conflict exists in the Circuits on the question of whether or not the *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), tests are applicable to a private action under the Age Discrimination in Employment Act which is being tried to a jury. We recognize that prior to the decision of this Court in *Lorillard* v. *Pons*, 434 U.S. 575 (1978), the Fifth Circuit did hold that the presence of the four elements of the *McDonnell Douglas* test in an action under the Age Discrimination in Employment Act make out a prima facie case under this Act. No other Circuit has so held. Indeed since the *Lorillard* decision this issue does not appear to have been presented to any Circuit. But in the posture of this case before the Sixth Circuit the court need not and did not address the question because it was not present. Petitioners apparently want to forget that this case was before the Sixth Circuit after the District Court entered Judgment n.o.v., the District Court in effect finding that the Petitioners produced no evidence of discrimination against them in violation of the Age Discrimination in Employment Act and that the Respondent's layoffs were, as stipulated, due to lack of work with the actual layoffs which were effected made pursuant to a bona fide seniority system.

Even if it is assumed *arguendo* that the four elements of the *McDonnell Douglas* test are involved in the case, we respectfully submit that these tests were not met by the Petitioners.

For example, the Petitioners do not meet the first test as they were part of a group – the Senior Electronic Development Technicians – and they cannot be isolated from this group in attempting to show that they are members of a protected class. The evidence is clear that the placement of individuals in this job classification has absolutely nothing to do with the chronological age of the employees and that employees both over

and under the age of 40 were in the job classification. Indeed, not even all of the Petitioners were over the age of 40 when they entered the Senior Electronic Development job classification.

In addition, the third test also is not present. There is not a scintilla of evidence on the record that any Senior Electronic Development Technician was replaced by anyone, let alone replaced by a person under the age of 40. If the Petitioners want to argue that the Senior Electronic Development Technicians were replaced by the employees in the Electronic Development Technician job classification (a fact which is totally contrary to the stipulated facts and any other facts on the record), this too will not result in meeting this test as there are employees both over and under the age of 40 in the Electronic Development Technician job classification.

CONCLUSION

The decision of the Sixth Circuit is correct and consistent with applicable decisions of the Supreme Court. As there is no conflict among the Circuits on the issues involved in this case and as the so-called issues raised by the Petitioners are not issues in the case which can properly be raised before this Court, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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and

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Counsel for Respondent

APPENDIX A

FINAL PRETRIAL ORDER

The Exhibits referred to in the Final Pretrial Order and the Appendices in the Final Pretrial Order have not been included in this Appendix.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CIVIL ACTION NO. C-3-74-29

HUBERT C. MORELOCK, and EUGENE F. BORGERDING, and WILLIAM D. EVANS, and CLAYTON METCALF, and RALPH B. SAUNDERS,

Plaintiffs[1]

vs.

NCR CORPORATION,

Defendant.

FINAL PRETRIAL ORDER

(Filed February 3, 1975)

This action came before the Court at a final pretrial conference held on February 18, 1975, at —— m., pursuant to Rule 16, Federal Rules of Civil Procedure.

[1] Parties are in agreement that Edward Thomson may be dismissed as a party plaintiff and is no longer involved in this action or affected by it.

I. APPEARANCES:

For Plaintiffs:

John B. Huber, Esq.
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Dayton, Ohio 45402
(513) 223-5771

For Defendant:

Gordon Savage, Esq. and
Thomas J. Harrington, Esq.
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and

Robert Signom II, Esq.
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Dayton, Ohio 45409
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II. NATURE OF ACTION AND JURISDICTION:

A. This is an action for back pay, liquidated and compensatory damages, mental suffering, anguish, humiliation (punative) damages, injunctive relief, attorney fees, costs and other relief, both at law and at Equity.

B. The jurisdiction of the Court is invoked under Title 29 United States Code, Section 626(C).

C. The jurisdiction of the Court was disputed by the Defendant and determined to be properly invoked by the Court pursuant to its Order dated August 15, 1974.

III. TRIAL INFORMATION

A. The estimated length of trial is four days.

B. (1) Trial to jury was been set for March 25, 1975, pursuant to the General Order on Trial Assignment on the limited questions of whether the Defendant has violated the Age Discrimination in Employment Act and, if so, what back pay is due each Plaintiff. The questions concerning special damages, injunctive relief and other equitable relief have been reserved to the Court for determination after the trial to the jury.

IV. AGREED STATEMENTS AND LISTS

A. GENERAL NATURE OF THE CLAIMS OF THE PARTIES

(1) PLAINTIFF CLAIMS: That the Defendant has limited, segregated or classified its employees in a way which deprives or tends to deprive Plaintiffs from employment opportunities and in a way which otherwise adversely affects their status as employees because of such Plaintiffs' age in violation of the Age Discrimination in Employment Act of 1967. That the Defendant has demoted and otherwise discriminated against Plaintiffs with respect to their compensation, terms, conditions and privileges of employment because of such Plaintiffs' age in violation of the Age Discrimination in Employment Act of 1967.

(2) DEFENDANT CLAIMS: That the Defendant has not limited, segregated or classified its employees in a way which deprives or tends to deprive Plaintiffs from employment

opportunities and in a way which otherwise adversely affects their status as employees because of such Plaintiffs' age in violation of the Age Discrimination in Employment Act of 1967. That the Defendant has not demoted and otherwise discriminated against Plaintiffs with respect to their compensation, terms, conditions and privileges of employment because of such Plaintiffs' age in violation of the Age Discrimination in Employment Act of 1967. That it has observed the terms of a bona fide seniority system which is not a subterfuge to evade the purposes of the Age Discrimination in Employment Act, which seniority system is applicable to all employees employed by the Defendant in its office clerical and technical employee unit, including but not limited to employees working in the same vocations as the Plaintiffs, with respect to all reductions in force or reductions from vocations affecting the Plaintiffs and that, therefore, all conduct of the Defendant complained of by the Plaintiffs is not unlawful conduct in violation of the Age Discrimination in Employment Act of 1967 pursuant to Section 4(f)(2) of said Act which states in part:

> "(f) It shall not be unlawful for an employer . . . (2) to observe the terms of a bona fide seniority system . . . which is not a subterfuge to evade the purposes of this Act. . . ."

That it has discharged Hubert Morelock for good cause, said Hubert Morelock having voluntarily elected to accept total permanent

disability benefits pursuant to the provisions of the NCR Employee and Family Group Benefits Plan #3 of the Defendant and that, therefore, the discharge of said Hubert Morelock by the Defendant is not unlawful conduct in violation of the Age Discrimination in Employment Act of 1967 pursuant to Section 4(f)(3) of said Act which states in part:

> "(f) It shall not be unlawful for an employer . . . (3) to discharge an individual for good cause."

That any physical disabilities claimed by Mr. Hubert Morelock related in any way to his employment by the Defendant are not recoverable as damages in this action, the sole and exclusive remedy for such disabilities, if any, being provided under the provisions of Chapter 4123 of the Ohio Revised Code pursuant to the provisions of Section 4123.74 of the Ohio Revised Code which states:

> "Employers who comply with section 4123.35 of the Revised Code shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment, or for any death resulting from such injury, occupational disease, or bodily condition occurring during the period covered by such premium so paid into the state insurance fund, or during the interval of time in which such employer is permitted to pay such compensation directly to his employees or the dependents of his killed employees,

whether or not such injury, occupational disease, bodily condition, or death is compensable under sections 4123.01 to 4123.94, inclusive, of the Revised Code."

B. UNCONTROVERTED FACTS

The following facts are established by admissions in the pleadings or by stipulations of counsel.

(1) That the jurisdiction of this Court has been invoked pursuant to the Age Discrimination in Employment Act of 1967, 29 USC § 626(c).

(2) That each Plaintiff is an individual and an employee within the meaning of the Age Discrimination in Employment Act of 1967, 29 USC § 621-634.

(3) That the records of the Defendant show the birthdates of the Plaintiffs to be as follows:

Hubert Morelock	November 22, 1924
Eugene Borgerding	June 20, 1924
William Evans	May 1, 1929
Clayton Metcalf	June 16, 1924
Ralph Saunders	October 25, 1920

(4) That the Defendant, NCR Corporation, is an employer within the meaning of the Age Discrimination in Employment Act, 29 USC § 623, with its principal office and place of business located within the jursidiction [sic] of this Court.

(5) That on or about October 1, 1973, the Plaintiffs filed a "Notice of Intent to Sue" with the Secretary of Labor and thereby fulfilled this jurisdictional prerequisite to the filing of this suit.

(6) That Plaintiff Hubert C. Morelock, SS # 292-14-5255, employee # 67857, was employed by the Defendant on November 10, 1948, and that the following represents a chronology of his employment:

Date of Commencement	Department	Job Classification	Vocation Number	Vocation Title
11/10/48	Assembly BX	Drill Operator	21	Drill Press
5/12/49	Laid off - reduction in force			
2/13/51	Assembly BX	Drill Operator	79	Drill Press 1 to 6 spindle
5/04/53	A-1A Machining	Cl A Drill & Tap Operator	755	Drill & Tap Cl A Oper.
6/21/54	Assembly BX	Drill Operator	79	Drill Press 1 to 6 spindle
10/04/54	Parts Inspector	Stock Weigher	128	Inspector Parts & Minor Sub Assembly
11/22/54	Parts Inspector	Bench Inspector	128	"
3/28/55	Inspection A	Inspector	128	"
4/30/56	Defense Assembly	Assembler	773	Assembler
3/10/58	Electronic Product Engineering	Technician	243	Tech.-Electronics Lab
10/01/59	Electronic Product Engineering "D"	"	243	"
7/10/65	Peripheral Equipment Engineering	"	243	"
3/01/65	"	Sr. Electronic Dev. Technician	243	Sr. Dev. Tech.
1/01/69	"	"	39820	"
3/13/72	Advanced Hardware Development A	"	39820	"

1/01/73	Ithaca Eng. Advanced Development	Sr. Electronic Dev. Technician	39820	Sr. Dev. Tech.
3/26/73	Tag Printer Engineering	"	"	"
6/25/73	Requirements Planning	Order Proofreader	53420	Manual Clerk
9/22/73	Inventory Stock Control	"	"	"
9/22/73	Commenced Sick Leave			
9/23/74	Terminated under total and permanent disability provisions of the NCR Employee and Family Group Benefit Plan #3.			

(7) That on November 28, 1973, Plaintiff Hubert Morelock filed a claim for Group Sickness and Accident benefits. A copy of the claim papers filed are attached hereto and incorporated fully herein as Joint Exhibit IA (note of transmittal); Joint Exhibit IB (Claim Form covering period 9/21/73 to 11/5/73); Joint Exhibit IC 1, 2 and 3 (attending physician's statement and incorporated employee's statement); Joint Exhibit ID (attending physician's supplementary statement and incorporated employee's statement); Joint Exhibit IF (attending physician's supplementary statement and incorporated employee's statement); Joint Exhibit IG (transmittal note from Hubert Morelock attached to Joint Exhibit IH); Joint Exhibit IJ (attending physician's supplementary statement and incorporated employee's statement); Joint Exhibit IK (attending physician's supplementary statement and incorporated employee's statement); Joint Exhibit IL (Hubert Morelock blood pressure readings); and Joint Exhibit IM, 1 and 2 (medical statement of S. J. Alezandrino, M. D., concerning Hubert Morelock).

(8) That on September 23, 1974, Hubert Morelock was terminated under the total and permanent disability provisions of the NCR Employee and Family Group Benefits Plan #3.

(9) That Plaintiff Eugene F. Borgerding, SS #302-18-8939, employee #34088, was employed initially by the Defendant on 11/-19/46, that he quit his employment 12/-19/49 to accept other employment, that he was reemployed by the Defendant on 9/4/50, and that the following represents a chronology of his employment:

Date of Commencement	Department	Job Classification	Vocation Number	Vocation Title
11/19/46	Final Inspection	Inspector	1001	Final Inspector
12/19/47	Quit employment			
9/04/50	Reemployed as new employee			
9/04/50	Final Inspection	Assembly Inspector	1001	Final Insp. Major Assem.
8/25/52	Screwmaking #1	Hand Screw Machine Operator	211	Screw Machine Oper.-Hand
3/23/53	Final Inspection	Assembly Inspector	1001	Final Insp.-Major Assem.
9/02/58	Commenced voluntary leave of absence			
12/01/58	Returned from leave of absence			
8/26/63	Electronic Inspection	Technician Grade B	496	Tech. Gr. B-Comp. Sub Assm.
5/11/64	"	Technician Grade A	511	Computer Unit Tech.-Grade A
9/08/64	Quality Engineering	Technician Grade A	511	Computer Unit Tech.-Grade A

1/01/67	C395 Systems Test & Inspection	Elec. Dev. Tech.	877	Elec. Dev. Tech.
10/23/67	Circuit Design & Analysis	"	877	"
1/01/69	"	"	32020	"
3/03/69	"	Sr. Elec. Dev. Tech.	39820	Sr. Dev. Tech.
10/02/72	Financial Systems Eng.	"	39820	"
1/01/73	Design Services Eng.	"	39820	"
6/25/73	Office Service	General Machine Operator A	53720	Duplicating Equip. Oper. & Clerks
10/15/73	Advanced Product Eng.	Sr. Elec. Dev. Tech.	39820	Sr. Dev. Tech.

(10) That Plaintiff William O. Evans, SS # 297-24-0475, employee # 2054, was employed on 6/5/47 by the Defendant and that the following represents a chronology of his employment:

Date of Commencement	Department	Job Classification	Vocation Number	Vocation Title
6/05/47	Frame	Tap Hand	6	Bench #1-Tapping Mach. Oper.
10/11/48	Commenced leave of absence - military			
11/20/52	A-1A Inspection	A-1A Technician	744	A-1A Tech.
4/23/56	Defense Inspection	"	744	"
12/03/56	Physical Research	Elec. Lab Tech.	617	Elec. Lab Tech.

3/11/57	Mfg. Lab	"	617	"
11/02/59	Chemical Dev.	"	617	"
2/22/60	Physical Research	"	617	"
3/21/60	Mfg. Lab	"	617	"
5/02/60	Physical Research	"	617	"
3/01/65	"	Sr. Elec. Dev. Tech.	617	Sr. Dev. Tech.
1/01/69	"	"	39820	"
1/01/73	Ithica Eng. Adv. Dev.	Sr. Elec. Dev. Tech.	39820	"
3/19/73	Design Services Eng.	"	39820	"
3/04/74	Microelectronics - R & D	Proc. & Matls. Sr. Dev. Tech.	38820	Proc. & Matls.-Sr. Dev. Tech.

(11) That Plaintiff Clayton Metcalf, SS # 299-14-7433, employee # 105481, was employed by the Defendant on 4/10/47 and that the following represents a chronology of his employment:

Date of Commencement	Department	Job Classification	Vocation Number	Vocation Title
4/10/47	Stock	Hand Trucker	269	Trucking (Hand)
6/21/47	Stock	Motor Trucker	270	Trucking (Motor)
2/07/48	Assembly CX	Bench Hand	314	Bench Work
6/09/58	Assembly C	"	314	"
10/06/58	Commenced voluntary leave of absence			

12/23/58	Assembly C	Minor Sub Assembler	10	Assembler-Minor
2/22/60	Assembly CX & F	"	10	"
12/07/64	Military Equip. Dev.	Sr. Elec. Dev. Tech.	243B	Sr. Dev. Tech.
3/01/65	"	"	243	"
4/03/67	Advanced Dev.	"	243	"
10/23/67	Processing - R & D	"	243	"
1/01/68	Applied Research Matls. & Dev.	"	243	"
1/01/69	"	"	39820	"
11/17/69	Advanced Hardware Dev.	"	39820	"
7/31/72	Financial Systems Eng.	"	39820	"
4/16/73	Test Equipment Eng.	"	39820	"
6/25/73	Design Services Eng.	"	39820	"

(12) That Plaintiff Ralph Saunders, SS #331-16-7774, employee #66109, was initially employed by the Defendant on 4/24/44, that he terminated his employment on 6/1/53, that he was reemployed on 7/6/53, and that the following represents a chronology of his employment:

Date of Commencement	Department	Job Classification	Vocation Number	Vocation Title
4/24/44	Repair	Register Line & 2000 Training	———	———

9/06/44	Transferred to Service Branch Office			
2/17/47	Repair	Accounting Machine	———	———
6/28/47	Transferred to Service Branch Office			
6/01/53	Quit employment			
7/06/53	Reemployed in Service Branch Office			
2/13/56	Repair	Instructor	———	———
10/08/56	Transferred to Dayton plant			
10/08/56	Elec. Prod. Eng.	Technician	243	Tech. Elec. Lab
10/28/57	"	Research Specialist Jr.	410C	Research Specialist
1/13/58	"	Technician	243	Tech.-Elec. Lab
6/24/63	Accounting Machine Eng. B	Elec. Lab Tech.	243	"
2/10/64	Peripheral Equipment Eng.	Elec. Lab Tech.	243	"
3/01/65	"	Sr. Elec. Dev. Tech.	243	Sr. Dev. Tech.
1/01/69	"	"	39820	"
3/20/72	Advanced Hardware Dev. A	"	39820	"
11/06/72	Financial Systems Eng.	"	39820	"
1/01/73	C270 Terminal Eng.	"	39820	"
3/26/73	Mailing & Communications	Mail Sorting Clk	39820	Manual Clk.
12/10/73	Microelectronics-R & D	Lab Aide	36020	Lab Aide
4/29/74	Microelectronics-Qual. Assurance	Jr. Dev. Tech.	38620	Process & Matls. Tech. Jr.
8/19/74	Class 272	Sr. Elec. Dev. Tech.	39820	Sr. Dev. Tech.

(13) That at all times material herein prior to September 1, 1964, while employed at the Dayton, Ohio, operations of the Defendant, the Plaintiffs were employed in the following described unit as set forth and described in the collective bargaining agreement in effect during such period between the Defendant and The NCR Employees Independent Union of Dayton, Ohio, the exclusive collective bargaining representative of all such employees pursuant to the provisions of § 9 of the Labor Management Relations Act of 1947, as amended (29 USC § 159).

1–RECOGNITION

The Company recognizes the Union as the sole collective bargaining agent for its Class "D" employees in the Factory and Offices located at Dayton, Ohio, and in the Slitting Plant at Washington Court House, Ohio, with the exception of service school students; field men; the rubber platemakers of the Printing Department; temporary employees at Old River, Sugar Camp, and the golf courses of the NCR Employees Benefit Association; premanent [sic] or temporary employees at Hawthorne Hill and Moraine Farm and those employees presently represented by the following unions:

Independent Union of NCR Plant Guards;
Dayton Typographical Union No. 57, International Typographical Union;
The Dayton Printing Pressmen and Assistants Union No. 54, International Printing Pressmen and Assistants Union of North America;

Dayton Electrotypers Union, Local No. 114, I.S. & E.U.; and
Dayton Photo Engravers Union No. 60, I.P.E.U. of N.A.

(14) That effective September 1, 1964, pursuant to action taken by the National Labor Relations Board, the bargaining unit described in Paragraph 13 was divided into two separate bargaining units as set forth in the collective bargaining agreement effective September 1, 1964, between the Defendant and The N.C.R. Employees Independent Union of Dayton, Ohio, the exclusive collective bargaining representative of all such employees in both described units pursuant to the provisions of § 9 of the Labor Management Relations Act of 1947, as amended (29 USC § 159).

Office – Technical Employees Unit

The Company recognizes the Union as the exclusive bargaining agent for all office clerical employees and technical employees employed at the Company's plants in Dayton and Washington Court House, Ohio, excluding confidential and managerial employees, professional employees, guards, supervisors as defined in the Act, and all other employees (including employees covered by the contract governing the unit established in 9-RC-5936 and 9-RC-5932 and employees represented as of the date of the execution of this Agreement by other recognized bargaining agents), for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

Production – Maintenance Employees Unit

The Company recognizes the Union as the exclusive collective bargaining agent for all production and maintenance employees at the Company's plants at Dayton and Washington Court House, Ohio, who are included in the bargaining unit as determined by the National Labor Relations Board in Case No. 9-RC-5932, and all employees in the toolmaking department at the Company's Dayton, Ohio, plant who are included in the bargaining unit as determined by the National Labor Relations Board in Case No. 9-RC-5936, for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

(15) That at all times material herein, commencing on and after September 1, 1964, and prior to September 10, 1971, the employees in the "Office-Technical Employees Unit" described in Paragraph 14 were represented for purposes of collective bargaining by The N.C.R. Employees Independent Union, the duly constituted exclusive collective bargaining representative of such employees pursuant to § 9 of the Labor Management Relations Act of 1947, as amended (29 USC § 159).

(16) That, as a result of a Petition filed with the National Labor Relations Board, and as a result of a secret ballot election conducted by the National Labor Relations Board on September 2, 1971, the majority of the employees in the Office-Technical Employees Unit described in Paragraph 14 voted to have no labor organization represent them for purposes of collective bargaining.

(17) That at all times material herein, effective on and after September 10, 1971, the date of the issuance of the "certification" of the results of the election conducted on September 2, 1971, by the National Labor Relations Board, no labor organization represented the employees in the Office-Technical Employees Unit described in Paragraph 14.

(18) That at all times material herein, effective on and after December 17, 1968, to September 10, 1971, the Collective Bargaining Agreement, Joint Exhibit II, attached hereto, was in full force and effect and set forth the rates of pay, hours of work, and other terms and conditions of employment for all employees in the Office-Technical Employees Unit described in Paragraph 14, including but not limited to matters relating to the application of seniority within the Office-Technical Employees Unit.

(19) That on or about July 20, 1971, the Defendant sent a letter to all Office Clerical and Technical Employees, Joint Exhibit III, attached hereto.

[#20 NOT STIPULATED]

(20) That at all times material herein, effective on and after September 10, 1971, to date, the employment policies of the Defendant including, but not limited to, matters relating to the application of seniority within the Office-Technical Employees Unit were as set forth in the *Employees Handbook* for NCR Dayton Office and Technical Personnel, Joint Exhibit IV, attached hereto.

(21) That the seniority listing of the employees in the Office-Technical Employees Unit described in Paragraph 14 as of January 1, 1970, as reflected by the records of the Defendant, was as set forth in Joint Exhibit V, attached hereto.

(22) That the seniority listing of the employees in the Office-Technical Employees Unit described in Paragraph 14 as of January 1, 1974, as reflected by the records of the Defendant, was as set forth in Joint Exhibit VI, attached hereto.

(23) That the seniority listing of the employees in the Office-Technical Employees Unit described in Paragraph 14 with seniority with the vocation numbered 39820 and called Senior Development Technician as of October 13, 1972, was as set forth in Joint Exhibit VII, attached hereto.

(24) That, during the period commencing October 13, 1972, and ending June 26, 1973, a reduction in force occurred within the Office-Technical Employees Unit described in Paragraph 14, which reduction affected the employees in Vocation 39820—Senior Development Technician. Effective on June 26, 1973, there were six employees working in Vocation 39820—Senior Development Technician, the following employees with the noted seniority and birthdates having been reduced from such vocation during this period due to lack of work within such vocation.

Reduction Date	Employee Name	Seniority Date	Date of Birth
4/06/73*	Davis, H. G.	10/20/69	11/22/42
11/10/72	Welker, J. F.	3/18/68	12/20/37
3/18/73*	Stalling, D. R.	6/13/66	6/03/36
3/30/73*	McCann, C.	2/07/66	12/12/38
12/19/72	Dexter, W. D.	1/24/66	6/11/41
1/12/73	Arnold, D. R.	12/20/65	12/06/35
3/18/73*	O'Connell, L. T.	10/25/65	3/03/39
3/26/73	Larsen, P.	6/14/65	1/09/35
2/16/73	Christopher, L. W.	6/07/65	1/05/39
3/30/73*	Weller, T. L.	5/03/65	4/26/41
3/16/73	Hess, J. E.	4/05/65	12/18/42
3/16/73	Taliafferro, E. F.	11/30/64	10/08/35
3/16/73	Nescher, G. E.	11/04/64	9/20/41
3/16/73	Dixon, D. E.	2/18/57	11/13/30
4/06/73	Houseman, M. J.	1/07/57	10/12/28
3/19/73	Hartman, G.	6/20/55	8/14/35
4/02/73*	Heisey, C.	6/06/55	5/04/30
3/26/73	Saunders, R.	7/06/53	10/25/20
6/25/73	Sheling, K.	5/10/51	6/25/30
6/25/73	Morelock, H.	2/13/51	11/22/24
6/25/73	Borgerding, E.	9/04/50	6/20/24

* These employees were held over to finish projects they were working on and/or to retrain personnel in critical areas within their new jobs. The above does not include payoffs for quits, retirements, deaths, etc.

(25) That during the period commencing October 13, 1972, and ending June 26, 1973, a reduction in force occurred within the Office-Technical Employees Unit described in Paragraph 14, which reduction affected the employees in Vocation 32020—Development Technician also. Effective June 26, 1973, there were fourteen employees working in Vocation 32020—Development Technician, the follow-

ing employees with the noted seniority and birthdates having been reduced from such vocation during this period due to lack of work.

Reduction Date	Employee Name	Seniority Date	Date of Birth
11/03/72	Eger, C. W., II	10/20/69	4/08/48
4/06/73*	Davis, H. G.	10/20/69	11/22/42
12/29/72	Simpson, G. J.	9/29/69	6/05/40
12/01/72	Helton, G. O.	8/25/69	4/29/49
2/09/73*	Millhouse, R. A.	11/20/67	2/18/48
12/04/73	Benko, G. A.	10/23/67	11/17/35
2/09/73	McLean, C. T.	9/05/67	7/10/38
3/09/73*	Walter, W. L., III	5/01/67	3/03/46
2/09/73	Prince, J. R.	4/12/67	1/22/46
3/19/73	Wehr, G.	4/03/67	10/01/42
3/02/73*	Cotterman, J. H.	8/24/66	1/31/42
3/16/73*	Sellen, J. A.	7/05/66	8/25/25
2/09/73	McCalla, J. E.	6/28/66	9/20/46
3/16/73*	Loewer, B. H.	5/16/66	10/06/34
3/16/73*	Weisenforth, E. J., Jr.	5/09/66	5/03/34
3/16/73*	Boyd, D. C.	7/06/65	12/02/45

* These employees were held over to finish projects they were working on and/or to retrain personnel in critical areas within their new jobs. The above does not include payoffs for quits, retirements, deaths, etc.

(26) That, at all times material herein from December 17, 1968, to date, the vocations and job classifications indicated within such vocations as indicated in Joint Exhibit VII, attached hereto, were in effect within the Office-Technical Employees Unit described in Paragraph 14.

(27) That, as of June 1, 1974, the number of employees in each vocation within the Office-Technical Employees Unit described in Paragraph 14 broken down by age into two categories—employees under the age of 40 and employees 40 years or over—was as set forth in Joint Exhibit VIII, attached hereto.

[#28 NOT STIPULATED]

(28) That, as of February 1, 1975, the loss of wages by the Plaintiffs as a result of having been reduced from the vocation Senior Development Technician was as follows; said amount having been computed based on the difference between the pay actually received and the pay such individual would have received had he remained in the Senior Development Technician vocation.

Ralph Saunders	$6,009.78
Hubert Morelock	1,687.36
Eugene Borgerding	1,195.20
William Evans	-0-
Clayton Metcalf	-0-

(While Defendant stipulates that said amounts are correct, Defendant does not thereby agree that this is a proper measure of damages if the Plaintiffs' theory of the case is correct.)

[#29 NOT STIPULATED]

(29) That, as of February 1, 1975, the loss of wages by the Plaintiffs as a result of having been reduced from the vocation Senior Development Technician was as follows; said amount having been computed based on the difference between the pay actually received and the pay such individual would have re-

ceived had he been reduced to the Development Technician vocation.

Ralph Saunders	$1,566.58
Hubert Morelock	451.97
Eugene Borgerding	206.40
William Evans	-0-
Clayton Metcalf	-0-

(While Defendant stipulates that said amounts are correct, Defendant does not thereby agree that this is a proper measure of damages if the Plaintiffs' theory of the case is correct.)

(30) That the Defendant at all times material herein was an employer amenable to and complying with the provisions of Chapter 4123 of the Revised Code of Ohio.

C. ISSUES OF FACT AND LAW

(1) CONTESTED ISSUES OF FACT: The contested issues of fact remaining for decision are whether certain statements were made by individual supervisors in the employ of the Defendant and what damages, if any, were incurred by each Plaintiff.

(2) CONTESTED ISSUES OF LAW: The contested issues of law in addition to those implicit in the foregoing issues of fact, are whether the Plaintiffs have been discriminated against in violation of the Age Discrimination in Employment Act of 1967; whether the seniority system of the Defendant applicable to all employees in the Office-Technical Employees Unit is a bona fide seniority system; and whether the alleged disabilities of Plaintiff Robert Morelock are compensable under the Age Discrimination in Employment Act.

D. WITNESSES

(1) Plaintiff will call or will have available for testimony at trial those witnesses listed on Appendix A hereof.

(2) Defendant will call or will have available for testimony at trial those witnesses listed on Appendix B hereof.

(3) Additional witnesses may be called for testimony upon leave first obtained from the Court. A Motion to Add Witnesses must be served upon opposing counsel with names, addresses and an Offer of Proof of such witness testimony at least five days prior to trial.

(4) The parties reserve the right to call rebuttal witnesses whose testimony could not reasonably be anticipated without prior notice to opposing counsel.

E. EXPERT WITNESSES

Parties are limited to the following number of expert witnesses, including treating physicians, whose names have been disclosed to the other side:

Plaintiffs 4 Defendant 3

(Defendant does not agree that individuals listed as experts by Plaintiffs are experts except for Dr. Alejandrino and Dr. Fox, but that their expertise is limited to their field of medicine.)

F. EXHIBITS

The parties will offer as exhibits those items listed herein as follows:

(1) Joint Exhibits – Appendix E

(2) Plaintiff Exhibits – Appendix F

(3) Defendant Exhibits – Appendix G

G. DEPOSITIONS

Testimony of the following witnesses will be offered by deposition/video tape:

None

H. DISCOVERY

Discovery has been completed.

I. MISCELLANEOUS ORDERS

Counsel for the Plaintiff reserves the right to add an expert witness, if one can be secured, to testify regarding certain actuary matters relating to costs of pensions and other benefits for older workers. If such a witness is called, counsel for the Defendant reserves the right to call an expert witness to rebut such testimony. The names of such experts will be furnished the Court together with their qualifications and to opposing counsel prior to February 18, 1975, or this provision shall be of no effect.

V. MODIFICATION

This final pretrial order may be modified at the trial of this action, or prior thereto, to prevent manifest injustice. Such modification may be made by application of counsel, or on motion of the Court.

VI. JURY INSTRUCTIONS

The parties will submit proposed Jury Instructions at least twenty-four hours prior to final argument.

VII. SETTLEMENT EFFORTS

The parties have made a good faith effort to negotiate a settlement.

CARL B. RUBIN /s/
United States District Judge

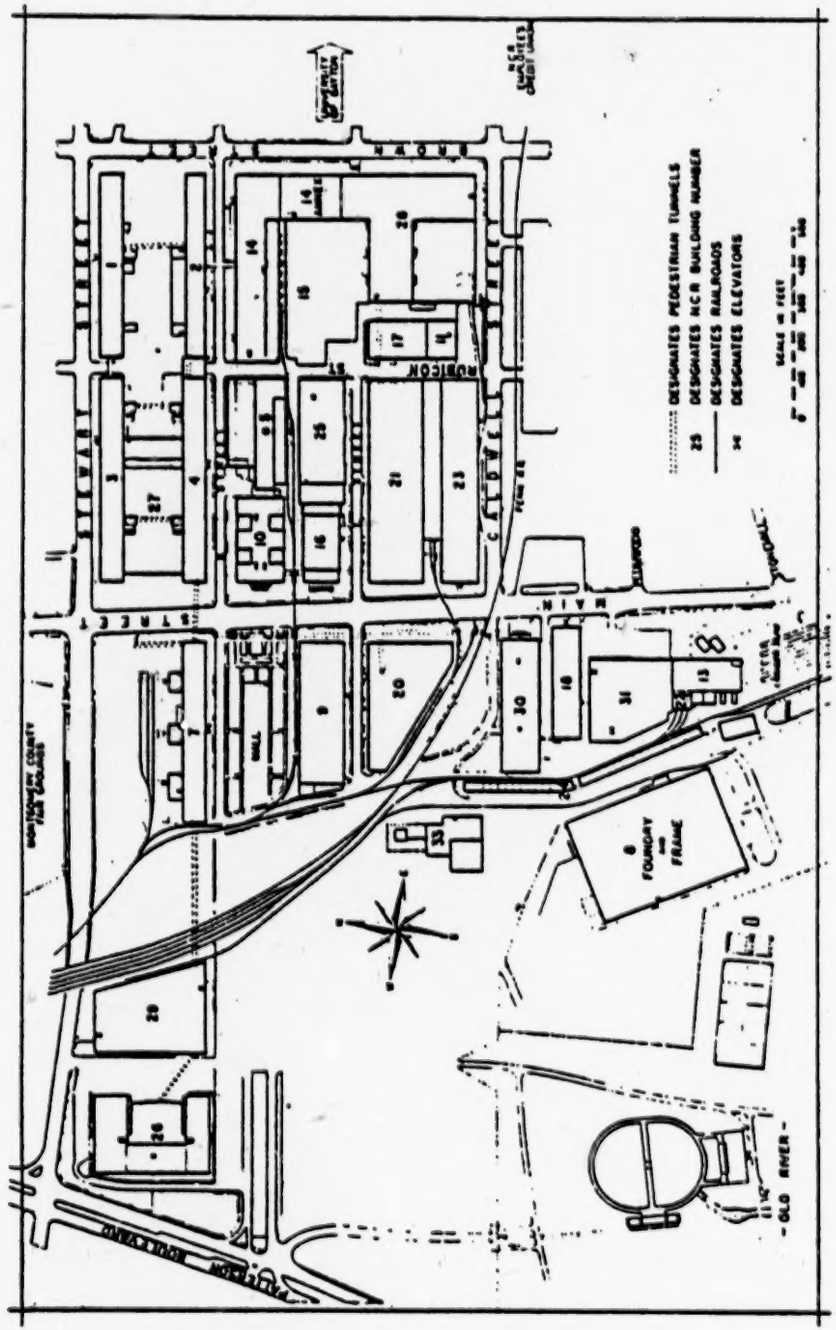
JOHN B. HUBER /s/
Counsel for Plaintiff

G. H. SAVAGE /s/
Counsel for Defendant

APPENDIX B

EMPLOYEES' HANDBOOK
for NCR Dayton
Office and Technical Personnel

[INDEX OMITTED]



NCR Dayton

[1] INTRODUCTION

This handbook is designed for use by the Dayton Office and Technical Personnel who were previously represented by the NCR Employees' Independent Union. Subjects covered and statements made in this handbook concerning policies, practices, services, rights and benefits relating to Dayton Office and Technical Personnel are not intended to be all inclusive but are intended to cover highlights applicable to the employees. Some of the items covered herein are subject to change over a period of time. Any major changes will be communicated to the employees.

The contents should provide a ready reference for many of the questions you may have about your employment or benefits at NCR.

As members of a dynamic company, we believe you will find this handbook helpful in determining the many employee services, benefits, and policies that enable each of us to have a meaningful and interesting career with NCR.

If you have questions which are not covered in this handbook, contact your supervisor and he will be happy to get the answers for you.

[2] WHO WE ARE

Think of NCR as a world-wide organization of thousands of people all involved – one way or another – with the processing of information. This includes research, development, manufacturing, marketing and servicing of a number of products and systems.

NCR's primary business mission is to provide our customers with practical solutions to their record-processing problems. These customers range from small retail stores using a single cash register to large firms whose investment in NCR equipment totals millions of dollars.

To meet this diversity of customer requirements, NCR offers a broad range of equipment which includes not only basic business machines but also new types of data terminals linked

by data storage and communications devices to central computer systems.

Think also of NCR as a Dayton organization with deep roots in this community. For 88 years, NCR has been a part of Dayton. The Company's world headquarters is located here, along with extensive manufacturing operations. It is at Main & K Streets that the far-flung operations of NCR come together.

IDENTIFICATION

Each NCR employee is issued an Identification Card to carry while on Company property. This is an integral part of an overall security program designed to prevent theft of Company and personal property, to avert industrial espionage, to make secure confidential or valuable Company information, and to provide effective personnel protection and traffic control. Each employee is required to show this identification card to Plant Security personnel in order to gain entrance to NCR facilities. Upon termination of active employment with NCR, this identification card must be returned to Plant Security.

WORKING HOURS

The normal work schedule at NCR does not exceed 8 hours a day or 40 hours a week. Reporting to work regularly and on time is essential to the proper operation of the business. In general, factory hours are from 7 a.m. to 4 p.m. and office hours are from 8 a.m. to 5 p.m. Although O&T employees do not punch time clocks, the Federal Wage & Hours Act requires NCR to keep an accurate record of your hours worked. To comply with this requirement, a daily time report is submitted to the Payroll Department on each employee.

[3] YOUR PAY

Payday for employees on the day shift is each Friday. Those who work on the night shift are paid on Thursday. Payment

is made by check and delivered to you personally in most instances. If, for any reason, you fail to receive it at the regular time, please notify your supervision. Your paycheck will represent payment either for the current week worked (if your department is paid current) or for the work of the previous week (if your department is paid a week in arrears).

Deductions from your pay are required by law for Federal Income Tax, State and City Income Tax and Social Security. You may authorize additional deductions for Credit Union, Savings Bonds, United Appeal, Employee Stock Purchase Plan and other purposes. All amounts deducted are shown on your paycheck stub. The stub also shows your total earnings for the year to date and the total amounts that have been deducted for taxes.

Pay Grade

The job which you hold has been assigned a Pay Grade. The Pay Grade is determined after careful consideration of the work content including the responsibility and skill requirements of the job. This process, known as job evaluation, begins with a job description which outlines generally the function and your responsibility for performing specific typical duties which are part of the job. Factors considered in the job evaluation process include such elements as the type and level of education and work experience required to do the job; the complexity and difficulty of duties performed; the consequences or effect of an error were it to be made; and other like factors. In addition to studying the job requirements relative to the evaluation factors, the job is also compared with other similar or related jobs to insure that it is equitably evaluated. This process of job evaluation, then, is used to determine the Pay Grade assigned to the job.

Salary Ranges

For Office Support positions there are 8 Pay Grades. For Technical Support positions there are 11 Pay Grades. Each

Pay Grade has a Salary Range. The higher the Pay Grade, the higher the Salary Range. The Salary Range allows for increased pay for the same job, depending upon performance and seasoning in the job.

Progression Increases

Increases in pay while in the lower portion of the Salary Range tend to be at specific time intervals and, consequently, may be considered as more automatic since you should be learning and gaining greater proficiency in performing the duties of the job. Increases in this portion of the range are normally on either a January-July cycle or on an April-October cycle. However, movement is not completely automatic since no increase would be awarded where an employee has not shown sufficient improvement to warrant higher pay in the range.

[4] Merit Increases

The opportunity for increases in the upper portion of the range is directly tied to merit and is intended to recognize and reward special effort and performance. In order to determine eligibility for a Merit Increase, your Manager will regularly review your performance. He will complete a written performance appraisal at periodic intervals when your pay has reached the Going Rate in the case of the Office Support jobs and the Midpoint Rate in the case of Technical Support jobs.

Longevity Increases

For those employees who have reached the Midpoint or Going Rate and who are doing a good job, but whose performance has not warranted a Merit Increase, there is still the opportunity to periodically receive a Longevity Increase for continued good performance in the job. Longevity increases will occur every 18 months of active employment until the employee reaches the Maximum of his Salary Range.

Review of Salary Ranges

Periodically, a review is conducted of the Salary Ranges to insure that they remain equitable with other kinds of jobs within the Company and also to insure that they continue to be properly related and competitive with other companies. The Salary Ranges may be adjusted as a result of such reviews. Such an adjustment will either provide increased "headroom" to earn Progression, Merit, or Longevity Increases or may result in the granting of a General Increase, depending upon the circumstances. In the case of an adjustment to the Salary Ranges, details will be explained by your Manager. You should consult your Manager concerning any questions you have about your job, your Pay Grade, your Salary Range, your performance, and your pay within the Salary Range.

Cost-of-Living

A Cost-of-Living Allowance is also part of the pay you receive at NCR. Cost-of-Living Allowance is pay for the job as was the pay described in the previous section – the only difference being that it is in a different form. The amount of this allowance is determined according to changes in the official Bureau of Labor Statistics Consumer Price Index, U.S. Department of Labor. This cost-of-living allowance is paid on a quarterly basis.

The present cost-of-living allowance is 5¢ per hour. Effective January 29, 1973, the cost-of-living allowance will be 5¢ per hour plus 1¢ for each 0.4 increase in the average of the Bureau of Labor Statistics "Consumer Price Index" for November 1972, December 1972, and January 1973, compared to the average of the BLS Consumer Price Index for the Base Months of November 1971, December 1971, and January 1972.

The Cost-of-Living Allowance is included when the rates for overtime premium, night shift premium, vacation payments, holiday pay, bereavement pay, jury duty pay, paid absence allowance, short term military duty pay, call in pay and show up pay are computed.

[5] Promotions

As was explained previously, each job has a Pay Grade. In some cases, an employee may have the opportunity to be transferred to a job in a higher Pay Grade when an opening becomes available. In such cases, the Salary Range for the higher grade would provide the potential for higher pay.

In addition, an opportunity *may* be provided for a Promotion Increase, depending upon circumstances such as the size of the change in Pay Grade and the employee's current pay relative to the new Pay Grade.

TARDINESS OR ABSENCE

It is important that you arrive at your work place before starting time so you will not be considered late. Late arrivals are counted in tenths of an hour (six minute periods). If you are late, you should contact your supervision concerning your situation.

If you must be absent, you must contact your department manager and state why.

ILLNESS ON THE JOB

If you are injured or become ill on the job, you should report immediately to your department head who will see that you receive proper attention. You should not leave your job without first reporting to your supervision.

Your supervision may refer you to the Medical Department where you will receive proper treatment or where a decision may be made to send you home.

LEAVING THE JOB

Once on the job, if you find it necessary to leave NCR during working hours, you should obtain a Time-Worked Pass signed by your supervisor. This pass should be presented to the person in charge of the exit door. If you intend to return the same day, you may inform him and he will hold your pass and check you in upon return.

If you are located in Buildings 10, 30, or other buildings as an Office or Technical employee and it is necessary for you to visit factory departments you should obtain a Special Pass from your department office. Your pass should be initialed in the department visited and returned to your own department office.

If your job requires you to move regularly between departments or buildings, you will be issued a special identification badge to wear during work hours.

Employees must stay on the job until quitting time. Only employees on jobs where special arrangements have been made may wash or make preparations to stop work before quitting time.

[6] OVERTIME

The regular daily or weekly schedule of hours of work does not normally exceed eight hours per day or forty hours per week. For purposes of computation the working day is considered to start at midnight. The employee's starting and quitting times, the time and length of meal period, and the workweek is scheduled by the Company.

Occasionally, your supervision may request that you work overtime. For hours scheduled by the Company in excess of the regular scheduled, you will be compensated as follows:

Time and One-Half

1. For time worked on any shift that starts on a Saturday.
2. For time worked beyond your quitting time when requested by the Company to work. In this case, you would be paid overtime only for time worked after the first eight hours worked, unless the hours lost were excused by the Company.

Double Time

1. For time worked on any shift that starts on a Sunday unless it is the start of the regular workweek. Example: On a third shift workweek which begins at 11:30 p.m.

Sunday and ends at 7 a.m. Friday, there would be no double time pay for the time between 11:30 p.m. Sunday and midnight.

2. For time worked in excess of 8 hours on a shift that starts on the previous day and continues into Sunday.

3. For time worked in excess of 16 continuous hours and until the continuous hours are broken for more than one hour.

Change in Starting or Quitting Time

If a change in your quitting time and/or starting time is made without 7 calendar days' notice, you will receive time and one-half for time worked after your prior scheduled quitting time and double time for time worked during the 7 hour period before your prior scheduled starting time, on the first day that your starting and/or quitting time has been changed. In the event you are required to work overtime on an off day and you and your supervision have agreed it would be mutually advantageous to change your starting, quitting, or meal time, you may waive the 7 day notice provided there is no intereference with other employees and/or shifts.

Miscellaneous Schedules

Personnel on unique schedules (such as computer operators) will normally be scheduled so as not to exceed forty hours of work per week. The employees' daily starting and quitting times, the time and length of the meal period, and the workweek shall be scheduled by the Company. Criteria for these personnel are as follows:

1. The nature of the work does not lend itself to a set schedule;

[7] 2. Seven days' notice of a change in the employee's scheduled starting or quitting time would be highly impractical, if not impossible;

3. The employees knew the nature of the job and accepted such conditions when employed;

4. Such factors were taken into consideration in establishing the employee's wages or salary.

For hours scheduled by the Company in excess of the weekly schedule, employees meeting the above criteria shall be compensated as follows:

Time and One-Half

- For time worked in excess of forty hours during the first five days of the employee's schedule.
- For time worked on Saturday, whether part of or in addition to the regular weekly schedule, unless it is part of a shift which started on Friday.

Double-Time

- For time worked on Sunday, whether part of or in excess of the regular weekly schedule unless it is part of a shift which started on Saturday.
- For time worked in excess of sixteen continuous hours. After an employee is entitled to double-time under this provision he will be entitled to continue to receive double-time until his continuous working hours are broken for more than one hour.

Starting and quitting times may be changed without notice. However, notice will be given in those instances where it is practical.

Holiday Pay

An employee who is scheduled to work on a holiday receives double-time pay unless time worked is part of the first eight (8) hours of a scheduled shift which started the previous day. However, employees scheduled to work on a holiday whose shift begins at 11:30 p.m. preceding a holiday will be paid double-time for the half-hour period prior to

12:00 midnight in addition to the double-time for the holiday hours worked. If you report to work at 11:30 p.m. of the holiday as the start of the next regular work day schedule, you will not be paid double-time between 11:30 p.m. and 12:00 a.m.

The company will not duplicate overtime payments. If time worked by an employee is covered by more than one of the provisions for overtime pay, only that provision providing the highest rate will apply.

CALL IN PAY

Any employee who is called to work after leaving the Company buildings and has completed his normal work day, shall be paid for a minimum of four hours at his regular rate plus any appropriate premium pay, even if less time is actually worked.

[8] An employee sent home for disciplinary reasons during the call-in period shall not be entitled to the four hours call in pay but will be paid for actual hours worked.

SHOW UP PAY

Any employee who reports to work at his scheduled starting time without advance notice of no work and is sent home by Management due to lack of work shall be paid a minimum of four (4) hours at his computed hourly rate except in cases of labor disputes or other conditions beyond the control of the Management.

Any employee sent home for disciplinary reasons during the first four (4) hours of work shall not be entitled to the four (4) hours show-up pay but will be paid for actual hours worked.

NIGHT SHIFT PREMIUM

A night shift premium of ten per cent (10%) of night shift earnings, including overtime premium, will be paid to all O&T employees working on shifts half or more the working hours of

which are scheduled between the hours of 2:42 p.m. and 6:00 a.m.

O&T employees working on special shifts not covered by the above where half or more of the regular working hours are scheduled between the hours of 12:00 midnight and 9:00 a.m. will be paid ten per cent (10%) premium of night shift earnings including overtime.

O&T employees working on shifts temporarily scheduled to start after 4:45 a.m. and before 6:00 a.m. will be paid ten per cent (10%) of earnings, including time and one-half overtime for hours worked between the hours of 4:45 a.m. and the employee's regular starting time.

UNITED APPEAL

The NCR Company recognizes the necessity for support of the United Appeal Program in Montgomery, Greene and Preble Counties and, therefore, recommends that all employees support this program to the fullest extent they can, depending upon their particular situation. It is the hope of the Management of your Company that employees will support the United Appeal Program by becoming members of the 10-Minute Club. We are sure that your support is appreciated by the many recipients who receive help from the United Fund organizations.

SOLICITATIONS

Specific rules governing solicitations and distributions are posted on Company bulletin boards.

[9] TRANSPORTATION AND PARKING

Many employees prefer to ride buses to and from work instead of driving their cars. Buses make regular stops near NCR. For those who desire to share a ride with someone, the Plant Security Department keeps a list of employees who are also interested in sharing rides.

Several parking lots are maintained by the Company for use of employees who drive to work. A large unreserved area east of Patterson Boulevard and a large area at the northeast corner of Alberta and Stewart are open to all employees.

Parking space assignments in the reserved parking areas are issued by Plant Security on the basis of Company business, medical disabilities or length of service. Applications (form F-4930) for spaces on length of service basis can be obtained from department clerks. Cars parked in Company lots should be locked.

Parking on Company streets – K from Old River Road to the U.S. Post Office and L from Canal Road to Rubicon – is prohibited unless a written pass has been issued by the Plant Security Office.

VACATION

Length of vacation depends upon accumulated years of service with NCR as of July 31 of the Vacation Year as indicated in the following schedule:

1 year of service but less than 8 years of service	2 weeks (80 hrs)
8 years of service but less than 15 years of service	3 weeks (120 hrs)
15 years of service but less than 25 years of service	4 weeks (160 hrs)
25 years of service and over	5 weeks (200 hrs)

Note

Twenty-Five Year Club members can take one week of the five week allocation a day at a time.

The vacation year extends from August 1 to July 31 of the following year inclusive. The employee is eligible for full vacation pay in line with accumulated years of service provided he/she has worked during at least twenty-six (26) pay periods of the vacation year starting August 1 and ending

July 31. Having worked during at least 13 pay periods of the vacation year beginning August 1 and ending July 31 will entitle an employee to one-half (½) of his/her vacation.

Vacation earned during the vacation year starting August 1 and ending July 31 may be taken in the applicable calendar year. Vacation time not used cannot be accumulated and carried forward into the following calendar year.

An employee who voluntarily quits the Company or is discharged will be entitled to vacation pay provided he/she works until at least April 1.

Vacation pay excludes any premium payments.

[10] Check with your supervisor if there are any questions concerning the length of your vacation for the current year.

The factory normally closes for vacations during part of August. Vacation announcements are posted on bulletin boards in ample time to make arrangements.

Employees are expected to take their vacations during the time the factory is closed, except those who are needed for scheduled work.

If an employee is required to take his vacation at a time other than during the "shutdown," he must make specific arrangements with his supervisor.

HOLIDAYS

Paid holidays granted by NCR during the year 1973 are: New Year's Day, Good Friday, Memorial Day (May 28), Independence Day, Labor Day, Thanksgiving, Christmas, and the normal work days immediately preceding Memorial Day, Christmas and New Year's Day.

An employee is entitled to 8 hours' holiday pay for the above mentioned holidays providing the employee works 8 consecutive hours or 4 consecutive hours at two different times during the payroll week in which the holiday falls or is celebrated. This work requirement is waived if the employee's absence is due to occupational disability of not more than one year and the holiday falls within that year. If the employee becomes ill and is sent home or to the hospital by

the Medical Department during hours of work in a holiday week and needs the remaining hours of that day to qualify for holiday pay, the employee will be credited for this purpose for the balance of the hours which would otherwise have been worked that day. A newly hired or re-hired employee will receive holiday pay provided the employee first reports to work on a day prior to the day on which the holiday falls or is celebrated. An employee reinstated on the payroll during a "holiday week" after sickness, leave of absence or vacation need not report to work prior to the holiday to qualify for holiday pay providing he/she works 8 consecutive hours or 4 consecutive hours at two different times during the holiday week.

If you are on a paid vacation at the time of a holiday, your vacation will be extended by one day, which should be the work day immediately prior to the beginning, or immediately after the end of your vacation.

Night shift premium is applied when computing holiday pay for second and third shift employees.

In addition to the holidays granted, each employee is entitled to three eight-hour scheduled working days of paid absence during 1973. These days may be taken at a time mutually convenient to the employee and the department during the calendar year 1973 if the employee is scheduled by his/her department to work December 26, 27, and 28. Otherwise, the 3 PA Days will be taken December 26, 27, and 28, 1973, giving the employee a total of 7 consecutive working days off during the Christmas-New Years' period.

In order to qualify for holiday pay and PA Day pay during the Christmas-New Years' period, the employee must work the last scheduled work day prior to and the next scheduled work day after the holidays. The only exceptions will be where the manager excuses the employee who does not work on December 21, 1973 or January 2, 1974 for reasons of illness or authorized leave of absence.

In no case can the Paid Absence Days be taken in anticipation of termination.

A Paid Absence Day not used cannot be carried forward into the next calendar year.

[11] LEAVE OF ABSENCE

The Company may approve an employee's request for a leave of absence if the reasons that are presented justify such action. Leaves of absence may be granted for the following reasons: personal, illness of member of immediate family, personal health and full time Public Office.

A leave of absence for one week may be granted by the department head if the request is consistent with the provisions of the policy.

If it is necessary to be absent for an extended period, in excess of one week, a formal request giving the reason must be made and approved as early as possible prior to the date of the requested leave period. Benefits in many cases remain in effect with some restrictions; however, no salary will be paid during the leave period.

Before returning to work in the department, employees must report to the Employment Department, preferably prior to the first day back.

MATERNITY LEAVE OF ABSENCE

An employee becomes eligible for Maternity Leave by submitting to the Medical Department medical evidence verifying her pregnancy. Such evidence should be submitted as soon as possible after she learns of her pregnancy but not later than the third month of pregnancy. The leave begins at the time recommended by her personal physician but not normally later than the end of the fifth month of pregnancy unless the Company Physician approves an extension. Maternity Leaves of Absence will extend for a period indicated by her physician but not longer than four months after delivery. Should a longer leave than four months be necessary, the provisions covering Medical Leaves of Absence take effect.

An employee should inform the Company as soon as possible of her intentions about returning to work. Upon returning for reinstatement she should report *first* to the Employment Department. A written release from her personal physician must be shown to the Company Physician. Upon his approval, she may return to work.

MILITARY LEAVE

In general, an employee entering full-time military service is entitled to accrue seniority and be eligible for the Company's military service benefits, provided he or she enters the service for the period set forth in Federal and State Veteran's Reemployment provisions. After separation from full-time military service, the individual must return to NCR within the time prescribed by law in order to maintain seniority status.

An employee who has less than one year of seniority who enters full-time military service in the Armed Forces of the United States receives one week's pay. An employee who has one or more years of seniority receives two weeks' pay. This pay is in addition to any paid vacation to which the employee is entitled.

[12] **Short Term Active Duty**

Military Reserve leaves are granted each calendar year as required. An employee taking military leave of less than three weeks should take his military orders to:

a. Employment Department, if an employee with less than one year's seniority.
b. Employment Department, if an office or technical employee other than R&D.
c. Executive & Professional Placement, if an R&D employee with more than one year's seniority.

An employee with at least one continuous year of NCR service who is granted a military reserve training leave will be paid the difference between military pay received for a training

period (not to exceed 15 calendar days) and the NCR pay which would have been received for regular hours worked (not to exceed 10 NCR work days.)

An eligible employee who is a member of the National Guard who is called for emergency or civil disorder duty is eligible to receive in one calendar year a maximum of ten (10) additional days of compensation. Such compensation amounts to the difference between Military Service pay for the day (including all allowances except for subsistence and travel) and regular pay (including shift premiums but excluding overtime or other premiums) for the last day worked.

Your supervision should be notified as soon as possible about a military leave so that the Payroll Department receives notice in advance to compute your pay.

JURY DUTY

Any employee who is called to and reports for Jury Duty will be paid the difference, if any, between the jury allowance and his base pay for a period not to exceed 60 days in any calendar year. Jury Duty pay shall not include any premium pay or night shift premium. Such compensation shall be payable only if the employee gives the Company prior notice of the jury call, presents proper evidence as to the Jury Duty performed and meets other eligibility requirements.

BEREAVEMENT PAY

A death in a person's family involves a personal loss which cannot be recovered. The loss is also accompanied by additional burdens, including time lost from work to attend the funeral and to take care of other arrangements. Bereavement pay provisions are provided by the Company to give some financial relief to employees who lose work because of these circumstances.

Bereavement pay of one to three days is granted to an employee when there is a death in the immediate family. The

number of days paid for [13] bereavement is determined by the deceased's residence and relationship to the employee.

Bereavement pay applies to consecutive scheduled working days. Saturdays and Sundays if not normally scheduled as work days and holidays are excluded from the consecutive working days rule. Therefore, if a bereavement day falls on an unscheduled Saturday or Sunday or a holiday, the employee will be entitled to time off with pay for the working day immediately prior to or following the above mentioned unscheduled day.

Policy:

1. Bereavement pay will not be paid if the eligible bereavement days occur when the employee is:
   a. On vacation
   b. On military leave
   c. Off work because of illness or injury
   d. Receiving salary continuance
   e. On a disciplinary suspension
   f. Paid off for any reason (i.e., authorized leave of absence, maternity leave, etc.)
2. The employee's attendance at the funeral is mandatory to qualify him for bereavement pay.
3. In the event of a funeral of an eligible relative in another state or country followed at a later date by memorial services in the area where the employee resides, one bereavement day will be granted if the day of the memorial service and the relationship of the deceased would normally qualify the employee for bereavement pay; however, the employee must take the bereavement day on the day of the memorial service and must attend the memorial services.
4. Receiving pay for an eligible bereavement day during a week in which a holiday occurs qualifies the employee to

receive holiday pay, even though he does not work during the week as scheduled.

5. Bereavement days will be paid at straight time for time lost not to exceed eight (8) hours. Bereavement pay shall not include any premium or shift pay.
6. When a work shift (e.g., third shift) spans two calendar days, the shift will be considered on that calendar day encompassing most of said standard work shift.
7. Bereavement pay will not be paid in lieu of taking a bereavement day.
8. Bereavement pay will not count as excused absence for overtime purposes. If an employee works part of a bereavement day, he will be paid bereavement pay only for the lost time.

Bereavement pay of up to three (3) consecutive working days lost applies in the event of the death of any of the following members of the household financially maintained and headed by the employee who are living with him in his household at the time of death. If a spouse's death occurs after removal from the employee's household into a resident or non-resident hospital or nursing home or if the death of any other listed members occurs after [14] removal from the employee's household into a non-resident hospital, that member of the employee's family shall be considered as "living with him in his household."

Spouse
Son or daughter, including legally adopted ones
Step-son or Step-daughter
Parent
Step-parent
Grandparent of employee
Step-grandparent of employee
Brother or Sister
Step-brother or Step-sister

Half-brother or Half-sister
Parent of current spouse
Step-parent of current spouse
Grandchild

A husband and wife living together are considered to be financially maintaining and heading a household.

Bereavement pay up to two (2) consecutive working days lost applies in the event of death of any of the following members of an employee's family who are not covered by the above paragraph.

Son or Daughter, including legally adopted ones
Step-son or Step-daughter
Parent
Step-parent

Grandparents, who assumed responsibility of rearing the employee prior to and up to the age of 19 years when parents were deceased or separated.

Bereavement pay for one (1) working day lost applies in the event of death of any of the following members of an employee's immediate family who are not covered by the above paragraphs:

Spouse
Brother or Sister
Step-brother or Step-sister
Half-brother or Half-sister
Grandchild
Parent of current spouse
Step-parent of current spouse
Parent of deceased spouse, provided employee has not remarried

Procedures for Requesting Bereavement Pay

1. Employee must request bereavement pay by completing and submitting to his department head Form F-3350, "Application for Bereavement Pay." For funerals in Montgomery County, Form F-3350 is to be completed except signature of clergyman or funeral director.
2. For funeral outside Montgomery County, Form F-3350, is to be completed with the signature of the funeral director on the form or on the stationery of the director attached to the form; OR a newspaper account of the death [15] may be attached to the form and submitted in lieu of the funeral director's signature to the department head.

Responsibility

1. An equitable administration of the above provisions concerning bereavement requires that the provisions of this policy be applied equally to all employees.
2. If an employee is in doubt concerning his eligiblity for bereavement pay, he should contact his department head.
3. In the event an employee knowingly makes application for and receives bereavement pay to which he is not entitled, such employee shall be required to reimburse the Company for pay received and shall be subject to disciplinary action.

FOOD SERVICE FACILITIES

The NCR Food Service Department operates low-cost food facilities for employees. Employee cafeterias are located in the following areas: Main Cafeteria, Bldg. 25; Research and Development, Bldg. 30, lower level; Marketing, Bldg. 26, 1st floor; and the Foundry, Bldg. 8.

Hot food, sandwiches, and hot and cold drinks are sold at many locations throughout the plant at food serving lines. Vending machines are also located throughout the area. If you prefer, you may bring your lunch or eat at one of the local restaurants nearby.

SAFETY

The Company recognizes that safety is a major consideration in the operation of a business and provides a safe working environment for NCR employees.

Management personnel are accountable for the safety of employees working under their supervision and provide adequate safeguards against hazards, necessary personnel protection, and thorough training in safe work practices.

Each employee also has a responsibility both to himself/herself and to fellow workers for personal safety. The employee is expected to observe all Company safety rules, including those pertaining to wearing apparel, safety specifications and safe work practices in the performance of the job and to report promptly to supervision any unsafe job method or unsafe condition noted. Each new or transferred employee will receive safety instructions from department supervision before starting on a job.

MEDICAL SERVICES

The Medical Department, located on the south side of the first floor of [16] Building 10, is maintained to give you prompt and efficient emergency treatment in case of accident or sickness. Medical Department services are limited to employees only.

EMPLOYEE AND FAMILY BENEFIT PLAN

The idea that a company's responsibility to its employees goes beyond the paycheck has been firmly established at NCR for several generations. By virtue of your employment at NCR, you have the security of coverage under a comprehensive Group Benefits Plan. Your benefits include life insurance, accidental death and dismemberment, full and partial salary continuance, plus monthly benefits for total and permanent disability. In addition, you and your eligible dependents are covered for hospitalization expenses, surgical expenses, doctor's fees for in-hospital calls during a confinement not requiring surgery, diagnostic x-rays, laboratory services, anesthetic expenses, and an allowance for braces and casting. Also, you and your eligible dependents are covered by a supplemental Major Medical Plan and a Dental Plan. The

administration of your Dental Plan is handled by mail through the insurance company. Inquiries should be directed to:

The Equitable Life Assurance Society of the United States
Division Claim Office
Suite 1118, Carew Tower
Cincinnati, Ohio 45202

Further details of your other Group Benefits coverage may be obtained from the Group Benefits Department.

RETIREMENT PLAN

The NCR Retirement Plan for Dayton Office and Technical employees offers a Non-Contributory Plan which is paid for entirely by the Company. Together with Social Security, it provides a retirement income based upon credited service and job classification or a percentage of final average salary, whichever provides a greater monthly benefit. Further details of this plan may be obtained from the Group Benefits Department.

WORKMEN'S COMPENSATION BENEFITS

NCR O&T employees are protected under the Workmen's Compensation Law of Ohio. The O&T employee becomes eligible for disability benefits as a result of an injury received in the course of, and arising out of, his employment. The employee who qualifies for such benefits will have disability benefits supplemented by the provisions of the Company-paid salary continuance plans for O&T employees.

[17] EMPLOYEE STOCK PURCHASE PLAN

NCR full-time employees with one year of continuous service are eligible to participate in the NCR Employee Stock Purchase Plan. The Plan permits employees to purchase NCR Stock through payroll deductions at less than current market value. Twice each year, on February 1 and August 1, during a five-year period ending January 31, 1975, a new

offering of stock will be made to employees. Information concerning the Plan is available in a brochure which was furnished to you when you joined the Company. If you did not receive this brochure, contact your department clerk.

PERSONAL CONDUCT

In fairness to all Office and Technical support employees, it is imperative that the Company set forth guidelines which will help direct you in your work. These guidelines are being communicated in an effort to avoid misunderstandings in some very sensitive areas involving conduct. Depending on the nature of the offense, disciplinary action for violating one of the guidelines may take the form of a verbal warning, a written warning, a disciplinary suspension, or a discharge. These guidelines should not be construed as limiting the proper rights of employees.

The rules and guidelines mentioned are not intended to be all-encompassing.

As you are aware, your supervisor is integrally involved in any "grievance" proceedings through an "Open Door" policy. In the area of discipline as with any other subject where you need someone to discuss matters of importance, relative to your employment, your line management is prepared to help you in any way possible.

DISCIPLINE PROCEDURE

Step 1. Verbal warning recorded on Step 1 Verbal Warning Record form in duplicate. The original is to be sent to the Employment Department, and the duplicate is to be retained by the employee's Manager for the department file.

Step 2. Written warning, recorded on Discipline Report form in duplicate. The original is to be sent to the Employment Department and the duplicate is to be retained by the employee's Manager for the department file.

Step 3. Same as Step 2.

Step 4. Disciplinary suspension to be recorded on Discipline Report form in duplicate, with the same distribution of these Reports as outlined above for Steps 1 and 2.

Step 5. Discharge.

[18] At the time the employee is about to be disciplined, suspended or discharged, the employee's management will communicate to the employee the reason for the action and give the employee an opportunity to respond.

All employees are expected to:

- Promptly commence work assignments at the scheduled shift starting times and after lunch periods and to continue working during scheduled hours.
- Work scheduled hours unless absent for proper cause. When absent, notify the appropriate department office of the absence and true reason for the absence.
- Work daily or weekly overtime when scheduled unless absent or excused for proper cause.
- Comply with the Company's rules, regulations, and expressed instructions of supervision.

Each employee is expected to do his/her part in maintaining a favorable working atmosphere which is conducive to getting the required work accomplished. In doing so he/she must refrain from:

- Loafing, unnecessary reading or conversation, sleeping, or otherwise deliberately restricting the progress of work.
- Acts of horseplay, etc., gambling and games of chance, immoral conduct or creating or contributing to unsanitary conditions.
- Violating the Company's "Solicitation Rules" which are posted on the Company's Bulletin Boards.
- Falsification of "Daily Attendance Report" or other time records.
- Possessing intoxicant, firearm or illegal or Company unauthorized weapon or drug.

– Being under the influence of intoxicant or unauthorized drug.
– Habitual or excessive absence.
– Threatening, using abusive language to, striking or fighting another person.
– Giving false information for employment.
– Parking automobile or other vehicle in restricted or unauthorized parking space, street, driveway, entrance or exit.
– Permitting another person use of his "Identification Card."

Prior proper permission from Management must be obtained by the employee in the following cases:

– Leaving work assignment, department, or Company premises during scheduled working hours.
– Failure to return at the conclusion of the lunch period.
– Selling merchandise or service of any kind, soliciting or collecting contributions for any purpose.
– Entering the premises during unscheduled hours.

In addition to specific disciplinary actions which may be taken on a particular offense, receiving written reprimands on three or more offenses is suf- [19] ficient grounds for suspension or discharge. Instances of offenses not mentioned here will be handled by supervision with disciplinary measures to be in line with the seriousness of the offense.

Disciplinary arction of any type taken with an employee will be disregarded only after twenty (20) months or more have elapsed from the date of the last violation *involving the same offense.*

In addition to the above mentioned guidelines, a few additional points of information are appropriate for your guidance.

Company telephones are necessary for efficient operation of Company business. If it becomes necessary in an emergency for friends or relatives to contact you, you should direct them to call you on your department's direct line.

Use of the telephones for personal calls should be kept to an absolute minimum.

Any package or other property being taken from the Company premises must be accompanied by a Property Pass (Form F-333) signed by your foreman or department head. The only exceptions to this rule are lunch boxes and unwrapped clothing. Guards at the building exits will collect the Property Passes. Guards have the privilege of examining any container or package, wrapped or unwrapped, either being brought into or taken out of the facility. It is the responsibility of the foreman or manager to check articles to be taken out before the pass is issued.

Employees are responsible for tools or Company property issued to them. If tools or other Company property are destroyed or lost through negligence or carelessness of an employee, the Company may set the value of these items and deduct this amount from the employee's pay. Tools issued to employees will be checked in periodically. When a person leaves NCR employment, all Company property charged to him must be turned in before his final paycheck is issued.

RECREATION

You are invited to attend free feature movies during your noon hour in the Auditorium. Shows begin at 12:10 and end at 12:50 p.m. You may also like to play cards, table tennis, dart baseball, indoor quoits, checkers or chess during the noon hour.

Old River, the Company's 156-acre recreational park, offers a vareity [sic] of activities, including swimming, picnicking and boating. The park, located at the west edge of the Company's main complex, provides recreation for employees, families and guests during the summer season.

The swimming pool area will accommodate several thousand persons. Small children have their own wading pool which

is under adult supervision. The children's pool is part of a "tot lot" which also contains swings, slides and sandboxes.

In the 22-acre picnic grove are a number of fireplaces and picnic tables. Boating and canoeing are also offered at scheduled hours. Other activities [20] such as badminton, baseball and minature golf are also available. Details about Old River can be obtained from the Recreation Department.

Interdepartmental sports are popular at NCR. Departmental teams compete in softball, bowling, basketball, golf, dartball, bait casting and horseshoe pitching. Tournaments at the end of the season determine the factory championship in each sport. Teams sponsored by NCR also compete with teams from other industries in league play in various sports. There are plant representative teams for women in bowling and golf and for men in bowling, basketball, golf, softball, volleyball, horseshoe pitching, bait casting, trap shooting, archery and tennis.

The NCR Country Club, operated by the Employees' Benefit Association and located south of Stroop Road, includes two 18-hole golf courses. The South Course is designated as a championship course, a challenge to experienced golfers. The North Course is open year round depending on the weather. The South Course opens in early April and closes in late October. There are also two putting greens and a driving range.

The clubhouse has a snack bar which is open from April through October. Buffet dinners are also served on Friday, Saturday, and Sunday evenings, May through October. The clubhouse area consists of a Golf Pro Shop and locker room facilities for men and for women.

Information about golfing memberships or social memberships is available at the Recreation Department or the Country Club.

In addition to activities of general interest, special interest clubs for NCR employees provide further opportunity for recreation and enjoyment. NCR clubs include a chapter of the Toastmasters, a Campers Club, a Stamp and Coin Club

and others. Watch the bulletin board for notices of clubs that may be of interest to you.

TWENTY-FIVE YEAR CLUB

NCR is proud of the large number of employees who have 25 years or more of service with the Company. These men and women make up the NCR 25-Year Club. New members receive a certificate of membership and a gold 25-Year Club pin, as personal mementos of their service.

EMPLOYEE COMMUNICATIONS

NCR has always believed that employees want to be informed about their Company. To do this, a complete communications program is provided.

The NCR Noon Headlines contains the latest Company, local, national, and international news in an abbreviated form. The Noon Headlines are available daily during the noon hour at various distribution points.

TIP, the Telephone Information Program, is a daily employee communications service, offering employees a short recorded message of general interest. By dialing 2070 on an NCR telephone or 449-2070 from outside NCR, you can stay informed on Company activities, employee benefits and other items of interest.

[21] NCR Dayton, the employee newspaper, is distributed regularly and contains news about events and people at NCR Dayton.

NCR World is a corporate magazine distributed worldwide. The magazine features activities of the Company and its employees around the world.

SERVICES TO EMPLOYEES

A BRANCH OF THE DAYTON POST OFFICE, located at the east end of the first floor of Building 10, is open from 8 a.m. to 5 p.m., Monday through Friday, and from 8 a.m. to 12 noon on Saturdays.

EMPLOYEE SERVICES, located on the third floor of Building 4 has a Deputy Registrar authorized by the State of Ohio to issue licenses for automobiles, trailers, motorcycles and house vehicles as well as 20-day tags, auto registration transfers, drivers' licenses and duplicates, and fishing and hunting licenses.

LEGAL DOCUMENTS requiring the seal and signature of a Notary Public will be notarized without charge in the Employee Services office.

FREE LEGAL ADVICE (not legal service) is available to you through a Company Attorney in the Legal Department in Building 10 between 4 p.m. and 5 p.m. daily. An appointment may be made with him through your supervisor, but this is not required. Availability of advice will depend on the schedule of the Department Staff.

A LOST AND FOUND CENTER is located in the Plant Security Department in the basement of Building 10.

THE NCR LIBRARY, located on the second floor of Building 10, is open from 8 a.m. to 5 p.m., Monday through Friday. It contains a collection of 21,000 books and magazines from which employees may borrow.

THE NCR BLOOD BANK offers a valuable service to employees by making available to employees and their immediate families any amount of blood that is needed at no charge. In order for the service to be available and to meet the demand, blood is donated by employees. Regular opportunities for donating blood will be announced and you are urged to donate blood for this purpose.

EDUCATIONAL OPPORTUNITIES

NCR Voluntary Educational Programs are available for all employees, offering a variety of courses to assist them in furthering their careers with NCR. Some classes meet for 26 weeks, others for 13 weeks, and may be offered as many as three times each year. A nominal registration fee is charged and text books are available at cost. Courses of study are

announced at the beginning of each term by the Employment Testing Department.

NCR participates in cooperative education for university students. A program of training is maintained where they can gain practical experience while qualifying for degrees in Business Administration, in Mechanical, Chemical, Metallurgical, and Electrical Engineering. The students alternate periods in school with periods on the job.

[22] The Deeds Scholarship was established by NCR in honor of Col. E.A. Deeds, former Chairman of the Board. The son or daughter of any NCR employee or any NCR employee may compete for this freshman year scholarship in Engineering or Business Administration at the University of Cincinnati which includes a co-op job at NCR. Application blanks and further details can be obtained from the Manpower & Organization Development Department.

The NCR Corporate Tuition Refund Plan has been established to encourage the development of individuals through college level academic training consistent with their abilities and interests and consistent with the needs of the Company. Graduate and undergraduate individual courses and degree programs are supported when the education is appropriately related to department or division objectives. You should consult your manager concerning further information on this program.

THE SUGGESTION SYSTEM

The NCR Suggestion System was started in 1894 by the Company's founder, John H. Patterson. Suggestions are welcomed regarding any phase of the Company's products and operation. If your suggestion is adopted, you will receive personal recognition and a cash award based on the value of the suggestion. Awards may range from $6 to $6,000. Complete information is given in the Company's suggestion booklet, which may be obtained from your department clerk or from the Suggestion Department in Bldg. 10. Suggestion blanks are located in boxes throughout the complex.

EMPLOYMENT PRACTICES

In addition to the hiring responsibilities, the Employment Department is responsible for processing transfers, promotions, reductions in force, separations, reinstatements and personnel and seniority records.

Policies concerning equal opportunity, transfers and promotions, reductions in force, recalls and separation are covered specifically below in outlined sections.

EQUAL OPPORTUNITY EMPLOYER

It is the policy of this Company that no employee or applicant will be discriminated against because of race, color, religion, sex, national origin, or age. This includes employment, upgrading, demotion, transfer, recruitment, layoff, termination, and all other personnel matters.

If you feel you have been discriminated against because of any of those reasons, you are urged to bring the matter to the attention of the office of Equal Employment Opportunity Programs, Data Terminals Division.

[23] YOUR VOCATION NUMBER

Any employee whose job is considered part of the "O&T" group has a vocation number assigned to the job. This number assigned by the Employment Department is based on content of the job. You may find that your job classification and several others share the same vocation number because the content and skill requirements are similar. Your vocation number is important in that your seniority accumulates within your vocation. Any reductions in force in your vocation are carried out in seniority order. Also, should you request a transfer, your request is processed by vocation number requested.

TRANSFERS AND PROMOTIONS

NCR provides an equitable transfer plan designed to insure uniform treatment through the following procedure:

The Company will fill each initial opening in a vocation by selecting an employee from within the department or by consulting the appropriate transfer list. In those instances when the initial opening is filled by an employee from the same department rather than from the transfer list, the opening which that transfer creates must be filled by first consulting the appropriate transfer list.

You are eligible to apply for a transfer to any number of vocations or for a higher salary grade within your present vocation when you have accumulated six months' credited service in your vocation. To apply, see your immediate supervisor who will provide you with the proper form. If you want to be considered for only specific departments, you should indicate your vocation and department preference at the time you submit your transfer request to the Employment Department. You will then be called only when a vacancy occurs in your preferred vocation and department.

You may change your transfer request at any time if you so desire. You will not be selected for transfer, however, unless your specific request is filed at least five regularly scheduled work days prior to the date the requisition is received in the Employment Department. Transfer requests will be filed in the order in which they are received in Employment. If more than one transfer request is received in Employment at the same time, the employees applying are placed on the transfer list in order of seniority.

The Company keeps a record of all transfer requests in the Employment Department. Your transfer request record contains your name, date of application, department requested, experience and vocations or salary grade requested.

[24] When the transfer list is consulted, the department manager must interview that employee who is first on the transfer list for the particular vocation. If the employee is not accepted, his or her name will be removed from

the transfer list. The department manager will then continue interviewing applicants, in order of application, until finding an employee with the basic minimum qualifications for the position. If there is an employee on the transfer list who is qualified for the position, the manager may not select a new employee. When an employee is accepted for transfer, his or her name will be removed from all other transfer lists. An employee may apply for another transfer after being in the new vocation or salary grade for one year. In no event is management obligated to release a transferred employee until a replacement is adequately trained. Of course, no employee will be transferred to work in another vocation if there are other employees with recall rights to that vocation.

You may also apply for a different shift within your vocation if you have accumulated six months' seniority. A record of your application will be kept both in your department and in the Employment Department in seniority sequence. When a vocation vacancy occurs in a department, the manager will first transfer the senior employee within the vocation in his/her department who has requested a shift change. If no employee has requested a shift change within his/her department, the Employment Department will transfer the senior employee, if any, from another department who has requested a shift change within his/her vocation.

If you have requested a shift change but refuse an opportunity to change, your name will be dropped from the list and you must reapply to regain eligibility.

The transfer lists in effect prior to the publication and distribution of this handbook will remain intact and will be consulted first when filling vocation vacancies. However, the Company is not obligated to honor transfer requests of Production and Maintenance employees who were on any Office or Technical Transfer List.

In most cases, employees transferred to an Officer Clerical and Technical vocation will receive credit for all their seniority in their new vocation.

SENIORITY

Seniority is acquired upon the completion of six (6) months' continuous service. At that time you will receive credit for six (6) months' seniority. Prior to acquiring seniority, you are on probationary status without seniority rights. During this period of probationary status, the Company shall evaluate your qualifications and the desirability of continuing your employment with the Company.

[25] Any seniority which you had accumulated prior to the NLRB election in September, 1971, will be maintained intact, regardless of whether part of that service was in the Production and Maintenance unit. In most cases, your seniority within your vocation is equal to your total seniority in all vocations. Upon transfer to a different vocation, your seniority within that vocation is in most cases immediately equal to your total seniority.

In computing credited service for seniority purposes, a seniority date is established for each employee. Length of service credited for seniority purposes (previously stated in terms of years, months and days) will be translated into and expressed as a seniority date which will give each employee the same relative standing on the seniority list which he or she had under the Company's Contract with the Employees' Independent Union, dated December 17, 1968.

In the event two or more employees have the same seniority date, relative seniority standing is determined by comparing the last four digits of the employees' Social Security numbers. The employee(s) having the lower number(s) will be given the higher seniority standing.

The following seniority policies apply in special situations:

Sickness — Seniority accumulates during the entire period of absence due to sickness. However, if you are employed

elsewhere without approval during sickness, your seniority will not accumulate during your absence. Bona fide maternity absence is considered as "sickness" separation. When you return to work after separation due to sickness, seniority permitting, you will be returned to the job in which you were employed at the time of illness.

Company Injury – If you are unable to work due to a Company injury, your seniority will accumulate continuously throughout the period of bona fide disability.

Leaves of Absence – Seniority accumulates during the entire period of authorized leave of absence.

Service in the Armed Forces – As required by law, your seniority will accumulate during service in the Armed Forces of the United States, provided you apply for reinstatement as set forth in the Federal and State Veterans' Re-employment Rights. Any questions in this area should be directed to your management.

Layoff – Seniority will accumulate during a layoff for as long as an employee has recall rights.

Loss of Seniority – An employee loses seniority if he or she quits, is discharged and not reinstated, is absent for five working days without notifying the Company (unless failure to notify was due to circumstances beyond his or her control), fails to report for work within five days after notification of recall, or has been laid off longer than the recall provisions provide. In addition to the above reasons, an employee loses seniority upon retirement and upon failing to return to work after a leave of absence.

[26] REDUCTION IN FORCE

For reduction-in-force purposes in some technical support vocations in the engineering area, a "department" is defined by the Company and may consist of a number of individual departments where similar kinds of work are assigned to technical support personnel.

In the event of a reduction in force, the following procedures will be observed:

1. Reductions in force will be made in line with the full seniority protection enjoyed by the O&T employee. Reductions will be processed first within the vocation, within the department. In the event an employee with seniority cannot be placed within his/her department, he/she will displace an employee within the vocation with less than six months' seniority. If there is no such employee, he/she will replace the employee with the least seniority in the vocation. If this is impossible because the reduced employee has the lowest seniority in the vocation, he/she will displace, on a qualification basis, employees with less than six months' seniority, less than one year's, one-to-two years', two-to-three years', and so on in the Office and Technical group.

2. In all cases where, due to reduction in force, the Company places the employee in another vocation, every effort will be made to place the employee as nearly as possible in line with experience and qualifications. The employee will also be placed as nearly as possible in a similar pay range.

3. In all instances of reduction in force, an employee cannot be reassigned unless capable of performing the minimum basic qualifications of the work of the prospective assignment.

4. An employee exercising seniority rights can reject a RIF transfer if he/she so chooses, and accept layoff without losing seniority recall.

5. In each instance of a RIF an employee may retain rights to his/her present shift provided seniority is adequate in the new assignment.

6. An employee affected by a reduction in force who has six months or more of seniority and who is qualified to fill an opening may supersede the placement of employees on a

transfer list, provided the reduced employee's seniority exceeds the seniority of the first employee on the transfer list.

RECALLS

An employee with seniority who, due to reduction in force, is removed from a vocation and who is not laid off, will retain recall privileges to the vocation from which he/she was reduced. A record of all employees with recall rights is maintained in the Employment Department in seniority order. Employees on a recall list may inquire about their status on that list by contacting the Employment Department. If an employee who is being recalled rejects the offer to return to his/her former vocation, he/she will lose recall rights. In filling openings, recall lists for the vocation where the opening exists take precedence over transfer lists.

[27] If an employee with seniority is laid off, that employee will retain recall rights for a period of one year. If after layoff a former employee is recalled, he/she must report and accept employment within five (5) working days of notice of recall in order to retain recall rights and seniority. It is the obligation of the person who is laid off to keep the Employment Department informed of any changes in address.

SEPARATIONS

There are two types of separations: voluntary and involuntary.

Voluntary separation is usually employee initiated. If an employee intends to resign, the employee should notify supervision as far in advance as possible. Before leaving the Company, the resigning employee should obtain a Request for Employment Interview Form (F-527) from supervision and take it to the Employment Department where final arrangements for separation will be made.

Involuntary separation is usually employer initiated. Discharge of an employee will occur only after seious [sic] consideration has been given to the circumstances. A set of guidelines

specifically prepared for Dayton O&T employees is included in this book. These guidelines and appropriate steps of the disciplinary procedure for violation of the guidelines will be enforced by the Company. If, after thorough investigation, the facts support discharge action, the supervisor will talk with the employee and state the reasons for an anticipated discharge. The employee will be given an opportunity to explain any disagreements with the findings before a final decision is made.

EMPLOYEE RECORDS

Up-to-date records are maintained in the Employment Department and Payroll Department for reference in times of emergency and for payroll purposes. In order that these records can be kept current, you should advise your department clerk of any changes in name, address or family status.

EMPLOYEE RELATIONS

NCR recognizes that there are situations which may develop between an employee and supervisor that cannot be resolved at that level. An employee always has the right to carry matters to the next higher level of management. In order to assure fair and equitable handling of any problems of this nature, however, the Company has established the position of Dayton O&T Employee Relations Manager in the Industrial Relations Division. Also, this position has the responsibility for monitoring industrial relations programs applying to the O&T group, assuring consistent and equitable treatment across divisional lines, and improving the flow of information to and from the O&T employees through their managers. This position is an extension of the [28] industrial relations function to focus on the O&T group formerly represented by the NCR Employees' Independent Union. This is a large segment of the total Dayton employment and is subject to common policies and programs although assigned to a wide variety of divisions.

O&T managers and employees are expected to continue to

deal with the appropriate departments within the Industrial Relations Division except in those cases where the subject matter cuts across several Industrial Relations departments or where it is not clear which department should be contacted. In these cases, the Dayton O&T Employee Relations Manager is the proper contact point within the Industrial Relations Division.

[QUESTION AND ANSWER CHART OMITTED]